Petition

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81-1895 NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRONZE SHIELDS, INC., *et al.*,
Petitioners,
vs.
NEW JERSEY DEPARTMENT OF CIVIL SERVICE, *et al.*

OLIVIA HOWARD, *et al.*,
Petitioners,
vs.
NEW JERSEY DEPARTMENT OF CIVIL SERVICE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 42 U.S.C. §1981 requires proof of intentional racial discrimination.

2. Whether the maintenance and use of hiring and promotional rosters that were created in a discriminatory manner is an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BRONZE SHIELDS, INC., et al.,

Petitioners,

vs.

NEW JERSEY DEPARTMENT OF CIVIL
SERVICE, et al.

OLIVIA HOWARD, et al.,

Petitioners,

vs.

NEW JERSEY DEPARTMENT OF CIVIL
SERVICE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bronze Shields, Inc.* and Olivia Howard petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.[*]

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* Bronze Shields, Inc. is a not-for-profit corporation with no parent companies, subsidiaries or affiliates.

OPINIONS BELOW

The opinions of the Court of Appeals in Bronze Shields, Inc. v. New Jersey Department of Civil Service (1a- 50a), is reported at 667 F.2d 1074 (3d Cir. 1981). The opinion of the Court of Appeals in Howard, et al. v. New Jersey Department of Civil Service (51 a- 62 a) is reported at 667 F.2d 1099 (3d Cir. 1981).

The opinion of the district court in Bronze Shields on the issue of the timeliness of the petitioners' discrimination charges (63a- 104a) is reported at 23

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[*] The other parties to this case are petitioners Percell Goodwin, Ramon Gonzalez, Hipolito Hernandez, Frank Howard, Jr., Willie C. Jackson, Johnson Livingston, Claude Pittman, John W. Reid, Willie Sanders, Marvin Thomas, Alonzo Williams, Rubin J. Battle, Floyd Bostic, Jr., Lynette Crawford and Charles Harris, and respondents New Jersey Civil Service Commission, Ralph Shaw (chief examiner of the New Jersey Department of Civil Service), S. Howard Woodson (President of the Civil Service Commission), Thomas DeLuca, John Holden, Matthias Rodriguez and Charles Walther (Commission of the Civil Service Commission) and Hubert Williams, Director of the Newark Police Department.

FEP Cases 1702 (D.N.J. 1979). The opinion of the district court in Bronze Shields on the issue of the standard of proof under 42 U.S.C. §1981 (105 a- 134 a) is reported at 488 F. Supp. 723 (D.N.J. 1980). Both of these opinions were entered in a similar case involving the Newark Fire Department (Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service) as well as the police department case at bar. The Vulcan Pioneers case is still pending before the Court of Appeals for the Third Circuit.

The district court decisions in Howard are not reported.

JURISDICTION

The judgment of the court of appeals in Bronze Shields was entered December 1, 1981 (139 a- 140 a), and a petition for rehearing *en banc* was denied December 28, 1981 (141 a). The judgment of the Court of Appeals in Howard was entered

December 4, 1981 (135 a- 136 a) and a petition for rehearing en banc was denied December 30, 1981 (137a). On March 16, 1982, Justice Brennan extended the time within which to file a petition for a writ of certiorari to April 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Sections 703(a)(1) and 703(a)(2) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, as amended by Sec. 8 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-

261, 86 Stat. 109, codified at 42 U.S.C. 2000e-2(a) provides in relevant part:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; of
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Section 703(h) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 257, codified at 42 U.S.C. 2000e-2(h), provides in pertinent part:

> ... nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended

> or used to discriminate because of race, color, religion, sex or national origin.

4. Section 706(e) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 260, as amended by Section 4 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 105, codified at 42 U.S.C. 2000e-5(e), provides in relevant part:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving

> notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

5. Section 706(g) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, as amended by Section 4 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107, codified at 42 U.S.C. 2000e-5(g) provides in relevant part:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

6. Section 4.1-11.5 of the New Jersey Administrative Code provides:

> An employment list, which has been in effect for not less than the minimum period required by law, may be terminated by the President with approval of the Commission for any good cause. Written notice of such termination shall be forwarded to all eligible persons thereby affected and they shall be afforded 20 days within which to make known their objections.

STATEMENT OF THE CASE

The Original Bronze Shields Case

These employment discrimination actions challenge race and sex discrimination in the hiring and promotion of police officers in the police department of Newark, New Jersey.*

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* Bronze Shields, Inc. v. New Jersey Department of Civil Service challenges discrimination on the basis of race and national origin. Howard v. New Jersey Department of Civil Service is based on allegations of sex discrimination. A single petition for a writ of certiorari is filed for both cases since they raise an identical issue of law and fact, involve the same defendants and two common plaintiffs and were consolidated before the Court of Appeals.

Bronze Shields, Inc. v. New Jersey Department of Civil Service was filed in December 1972. As originally filed, it alleged that the defendants engaged in a practice of racial and national origin discrimination in violation of 42 U.S.C. §1981 and §1983, and the Thirteenth and Fourteenth Amendments to the United States Constitution. The named plaintiffs, petitioners here, included Bronze Shields, Inc., an association of black police officers in the City of Newark, individual applicants who had been barred from employment by the entrance examinations and other practices of the New Jersey Department of Civil Service, applicants who were acceptable to Civil Service but had been rejected by Newark, and police officers who sought promotion to higher ranks but whose promotions were prevented by Civil Service. Jurisdiction was based on 28 U.S.C. 1331(a) and 1343(3). In 1976, the District Court certified three plaintiff subclasses, consisting of applicants barred by Civil Service, applicants barred by Newark and those denied promotion. Order of August 9, 1976.*

The complaint alleged, and discovery indicated, that the practices of the defendants excluded a much higher percentage of minorities than whites. Only about 20 percent of Newark's police officers were black or hispanic, compared to the Newark Labor Force that was more than 50 percent black or hispanic. (Court of Appeals Appendix at 240, U.S. 1970 Census of Population and Housing, Newark, New Jersey SMSA Table P-1). White applicants passed the Civil Service Police

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* The New Jersey Department of Civil Service, the New Jersey Civil Service Commission and their constituent officers were named as defendants because, pursuant to New Jersey state law, they are responsible for the creation of hiring and promotion rosters and the certification of persons on the rosters for appointment or promotion by the Newark Police Department. N.J.S.A. 11:21-1 _et seq_.

Officer exams at a rate two to three times higher than did black and hispanic applicants (6 a). Based on this showing, the District Court, in 1974, entered a preliminary injunction requiring Newark to hire one minority police officer for every two white police officers appointed. (Order of Nov. 26, 1974). Newark appointed police officers pursuant to this preliminary injunction only once, in 1977. Th preliminary injunction expired with the dismissal of the case in 1980.

In 1976, following this Court's decision in Washington v. Davis, 426 U.S. 229 (1976), the respondents moved for summary judgment in Bronze Shields on the grounds that the petitioners were required to prove intentional discrimination. The District Court deferred decision on the motion because charges of discrimination had been filed with the Equal Employment Opportunity Commission.

(Letter Order, March 30, 1977). Following dismissal of the Title VII claims, as described below, summary judgment was granted for the respondent (105a).

The Court of Appeals affirmed the dismissal of the original complaint against Civil Service. It held that the petitioners were required to prove intentional discrimination to establish a violation of 42 U.S.C. §1981 and that there was insufficient evidence of such intent.*

The petitioners seek review of the Court of Appeals' holding that they are required to prove intentional discrimination to establish their claim under 42 U.S.C. §1981.

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* As to the petitioners' claims against Newark, regarding Newark's rejection of applicants previously approved by Civil Service, the Court held that there was sufficient evidence of possible intentional discrimination to require a trial. It reversed the dismissal of Newark and remanded the matter (139a).

The Title VII Claim

The Title VII portion of Bronze Shields commenced in June and July 1976. At that time, six individual petitioners filed class claims of employment discrimination with the Equal Employment Opportunity Commission naming the New Jersey Department of Civil Service, the New Jersey Civil Service Commission and the City of Newark as respondents. The charges alleged race discrimination in the hiring and promotion of police officers.

At the time these charges were filed, there was in effect a police officer hiring roster that had been promulgated by Civil Service on May 3, 1975. (Joint Statement for Pretrial Order, 3). Pursuant to state law, permanent appointments to the police department could only be made from that roster. The charges were filed more than 180 days after the roster had been promulgated, but while it remained in use. The roster remained in effect for three years and was actually used to make 27 appointments in the fall of 1977. A Civil Service roster for promotion to sergeant was also in effect when the charges were filed. It had been promulgated September 14, 1974 (97a) and had a duration of three years. (Joint Statement for Pretrial Order, 4).

Two of the petitioners who filed Title VII charges, Olivia Howard and Lynette Crawford, were black applicants who had been rejected by Civil Service for failure to pass the written exam that was used to create the hiring roster then in effect. About 35% of the white applicants who took the exam passed it, but only about 10% of the nonwhite applicants did. (Court of Appeals Howard Appendix A41). These two petitioners had been excluded from the roster when it was promulgated in May 1975 and were barred from any further consideration for the position of police officer for the three years the roster remained in use.

The remaining four petitioners who filed Title VII charges were black Newark police officers. Two of them, Frank Howard and Floyd Bostic, Jr. were on the sergeant's roster in effect when their charges were filed. Petitioner Bostic's position was subsequently reached and he was promoted, but petitioner Howard never was.

These Title VII claims were added to the original Bronze Shields case by amendment in 1978. Jurisdiction was based on Section 706(f)(3) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3), and on 28 U.S.C. 1331(a) and 1343(3).

In 1979, the Title VII charges were dismissed on the grounds that the Title VII charges had not been filed within 180 days of the promulgation of the rosters that were under attack (104a). The Court of Appeals, with one judge dissenting, affirmed the dismissal of the Title VII charges on this ground (139a). It held that the rosters could only be challenged within 180 days of their promulgation. They could not be challenged, as here, while the rosters remained in use. The petitioners seek review by this Court of that holding.

With the dismissal of the original section 1981 claim and the Title VII amendment, the petitioners were left without remedy. The Court of Appeals suggested that a pattern and practice suit brought by the United States could provide relief but in this the court misspoke (3 a). The suit referred to was brought against discrimination in the Fire department, not in the Police department subject to this suit.

The Howard Sex Discrimination Claims

The sex discrimination charges of the Howard case were commenced at the same time as the Title VII race discrimination charges, in 1976. Olivia Howard and

Lynette Crawford, the two applicants who had been excluded from the hiring roster, alleged sex discrimination as well as race discrimination. Newark had only 7 women on a police force of more than 1600. Since 1965 it had appointed 815 men as police officers, but not a single woman. (Court of Appeals Howard Appendix A106). Three Hundred eleven women took the 1975 Civil Service exam, but only four women appeared to be on the 1975 roster from which the petitioners had been excluded (id. A96), and none of these was hired (id. A78). Four hundred eight men were placed on the roster, and 27 were hired. (Id.)

The petitioners' sex discrimination claim, unlike their race discrimination claim, was not added to the Bronze Shields case. Jurisdiction was based on 28 U.S.C. 1331(a) and 1343(3) and on Section 706(f)(3) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3). Following dismissal of the Title VII race discrimination claim in

Bronze Shields, the sex discrimination Title VII claim was dismissed for the same reason: the plaintiffs had filed their Title VII charge more than 180 days after the promulgation of the roster. The petitioners' equal protection sex discrimination claim was also dismissed. Since the petitioners could no longer challenge their exclusion from the roster on racial grounds, they were held to lack standing to challenge sex discrimination as a violation of equal protection. The Court of Appeals affirmed this dismissal (135a), and the petitioners seek review here.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION ON THE QUESTION OF THE STANDARD OF PROOF UNDER 42 U.S.C. SECTION 1981 BECAUSE IT HAS GRANTED A PETITION RAISING THE SAME ISSUE IN ANOTHER CASE

The petitioners' race discrimination claim was originally filed in 1972 alleging in part discrimination in violation of

42 U.S.C. 1981. In 1976, the respondents moved for summary judgment on the grounds that the petitioners were required to prove intentional discrimination under that statute and had insufficient evidence of such discrimination. In 1980, the District Court granted the motion for summary judgment on these grounds. On appeal, the Court of Appeals for the Third Circuit affirmed the holding that the petitioners were required to prove intentional discrimination under 42 U.S.C. Sec. 1981, basing its decision on its recent _en banc_ opinion in _Croker v. Boeing Co._, 662 F.2d 975 (3d Cir. 1981).

This Court has recently granted a petition for a writ of certiorari to the Second Circuit Court of Appeals on the very same question. _Guardians Ass'n of New York v. Civil Service Commission of the City of New York_, No. 81-431.* Fairness requires that this Court consider the Section 1981 issue in this case together with its consideration of the issue in Guardians. The instant case poses the question of the standard of proof under Section 1981 under circumstances almost identical to those presented in Guardians. Both actions challenge civil service selection practices that disproportionally excluded minority police applicants. Both cases arise from exclusionary practices that occurred before the 1972 amendments to Title VII expanded that law to cover public employers. Thus, some petitioners in both cases are left without a remedy unless the holdings of the lower courts are reversed.

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* The question of the standard of proof for 42 U.S.C. §1981 may also be reached by this Court in _General Building Contractors Association,Inc. v.Pennsylvania_, No. 81-280.

The question of what standard of proof is to apply in an employment discrimination action under 42 U.S.C. Sec. 1981 was thrown into question by this Court's decision in Washington v. Davis, 426 U.S. 229 (1976).

Prior to that decision, the Courts of Appeals had generally taken the position that it was sufficient to make out a prima facie case under 42 U.S.C. Sec. 1981 to show that an employment selection practice had an adverse impact on minority persons.* Although Washington v. Davis decided the Constitutional question of what standard is required to claim a denial of equal protection, the Courts of Appeals have mechanically extended that analysis to the statutory question of what standard of proof is embodied in the Civil Rights Act of 1866, the source of 42 U.S.C. Sec. 1981. The issue for Section 1981 is Congressional intent, not Constitutional jurisprudence. The courts have paid little attention to the historical circumstances surrounding the adoption of the Civil Rights Act of 1866. Compare Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980) cert. denied, 450 U.S. 919 (1981) with Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) and City of Memphis v. Greene, 451 U.S. 100, 129ff (1981) (White, J., concurring). See Note, Section 1981: Discriminatory Purpose or Disproportionate Impact?, 80 Col. L. Rev. 137, 155-59 (1980). Moreover, many lower courts have not full considered the significance of the fact that Section 1981 had its origins in the Thirteenth Amendment rather than in the equal protection clause of the Fourteenth. E.g., Des Vergnes v. Seekonk Water Dist., 601 F.2d 9 (1st Cir. 1979); Mescall v.

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* See, e.g., Boston Chapter,N.A.A.C.P. Inc. v. Beecher, 504 F.2d 1017, 1021 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976); Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1200 (D. Md.), aff'd in pertinent part sub nom. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1320-21 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976); Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); Chicago Police Officer's Ass'n v. Stover, 526 F.2d 431, 438 (10th Cir. 1975), vacated and remanded, 426 U.S. 944 (1976).

Burrus, 603 F.2d 1266 (7th Cir. 1979); Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978). This Court should give plenary consideration to both of these issues.

The resolution of this issue is important for the sound administration of civil rights law. The current approach of the lower courts leaves employment discrimination law in the anomalous situation of subjecting the same exclusionary practices to different standards of judicial control, depending on whether or not the plaintiffs first brought their complaint to the attention of the Equal Employment Opportunity Commission pursuant to Title VII. Croker v. Boeing Co., 662 F.2d 975, 1000-1001 (Aldisert, J., dissenting).

II. THIS COURT SHOULD DETERMINE WHETHER THE MAINTENANCE AND USE OF DISCRIMINATORY EMPLOYMENT ROSTERS VIOLATES TITLE VII IN ORDER TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AND TO ASSURE FULL ENFORCEMENT OF TITLE VII

A. There Are Conflicting Decisions Between the Circuits

There is a conflict in the circuits concerning whether it is the maintenance and use of a discriminatory employment roster that constitutes an unlawful employment practice, or only its initial promulgation. The Court of Appeals for the Third Circuit has identified the practice in this case only as the promulgation of the hiring and promotion rosters. The fact that the respondents precluded the petitioners from any further opportunity for hiring or promotion during the life of the rosters was not held an unlawful employment practice.

The Third Circuit's position is in direct conflict with the position of the Second Circuit. In Guardians Ass'n of New York City v. Civil Service, 633 F.2d 232

(2d Cir. 1980), petition for cert filed (no. 81-432), the Court of Appeals for the Second Circuit maintained that the use of a hiring roster by the police department of the City of New York was a violation of Title VII.

> By utilizing the tainted test results for years after becoming subject to the commands of Title VII, defendants continued a course of conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner.
>
> 635 F.2d 249

Accord, Acha v. Beame, 570 F.2d 57 (2d Cir. 1978). In Association Against Discrimination v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), cert. denied, Nos. 81-373, (50 LW 3695, Mar. 1, 1982), the Second Circuit also found a continuing discriminatory practice to extend over the promulgation and use of a series of hiring rosters.

The Third Circuit is also in conflict with the Sixth Circuit. The Court of Appeals for the Sixth Circuit held in Roberts v. North American Rockwell Corporation, 650 F.2d 823 (6th Cir. 1981), that plaintiff's Title VII charge was not tiem barred even though the date of the initial refusal to accept her application for employment was more than 180 days from the filing of her claim with the EEOC. The Court stated, "We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well." 650 F.2d at 827. While that case did not involve an employment roster, the principle it announced should require that the maintenance and use of a discriminatory roster be treated as a violation.

The Second and Sixth Circuits are in conflict with the Fourth and perhaps Ninth Circuits. The Fourth Circuit in Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978), affirmed a holding that defendants could not be liable for discrimination arising from a firefighter promotional test given more than 180 days prior to the filing of the EEOC charge.*

In the Ninth Circuit, the Court of Appeals held in Williams v. Owens-Illinois Inc., 665 F.2d 918 (9th Cir. 1982), that aggrieved parties must be provided an opportunity to prove a continuing violation as to claims of discriminatory job placements or denials of promotions. However, it affirmed the lower court's ruling that plaintiffs' Title VII claims regarding hiring and discharge were time barred because they had not been filed within 180 days of rejection or discharge. The Court in Williams was not considering the maintenance of an illegally created employment roster. In an earlier case, however, Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979), where the 9th Circuit did consider the issue, it held that a charge that challenged a roster was timely even if it had not been filed within 180 days of the initial promulgation of a firefighter hiring roster. See also Moore v. City of San Jose, 615 F.2d 1265, 1274 (9th Cir. 1980), and Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 760 (9th Cir. 1980).

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* It is not clear whether Friend still controls because of the Fourth Circuit's decision in Patterson v. American Tobacco Co., 634 F.2d 744, 751 (4th Cir. 1980), rev'd No. 80-1199, where the Court adopted a continuing violation theory.

The Fifth Circuit has not clearly stated whether or not the maintenance of a discriminatory roster is an unlawful employment practice. In Gonzalez v. Firestone Tire and Rubber Company, 610 F.2d 241 (5th Cir. 1980), the Court of Appeals held that even though an employer has allegedly ceased using discriminatory employment lists generated by test scores more than 180 days before the plaintiffs' charge was filed, if the employer continued to base its selection of employees on the basis of unvalidated tests, the plaintiffs' charge was timely. In Yates v. Mobile County Personnel, 658 F.2d 298 (5th Cir. 1981), however, the Court held that plaintiff's failure to file a complaint within 180 days of receiving notice that he had not achieved a test score high enough to warrant the placing of his name on the employment register for the position of City Clerk barred his claim under Title VII. The Court did not mention whether the allegedly discriminatory register remained in use when the charge was filed, as it did in the case at bar. It also did not mention Gonzalez. Therefore, it is not clear whether its decision in Yates overrules Gonzalez.

The present conflict in the circuits results from the fact that this Court has not stated whether the maintenance of a discriminatory employment roster constitutes a violation of Title VII. Neither United Airlines v. Evans, 431 U.S. 555 (1977) nor Delaware State College v. Ricks, 449 U.S. 250 (1980), which have been relied on in this case, provide a definition of an unlawful employment practice that applies to this case. This Court did not consider the question whether Evans' claim would have been timely had the company's discriminatory policy continued until the date of her filing. In Ricks, this Court states that determining the timeliness of a complaint requires precise identification of the unlawful employment practice but it does not define such a practice. 449 U.S. at 257.

This conflict in the circuits produces an uneven enforcement of Title VII. Guidance from this Court is necessary to determine the nature of an unlawful employment practice involving employment rosters so that employers and employees will know with certainty what their obligations are.

B. The Court of Appeals Decision Contradicts the Plain Language and the Legislative Purpose of Title VII

The Third Circuit, in determining when an unemployment practice occurred, drew a distinction between the promulgation of discriminatory employment rosters and their maintenance and use. In effect, it defined the unlawful employment practice narrowly to include only the promulgation of a roster. It failed to understand that the maintenance of a roster itself constitutes an unlawful employment practice within the meaning of Title VII. Title VII's definition of an unlawful employment practice, its remedy provisions and its legislative history all plainly establish that Congress intended to give Title VII a broader meaning than the one attributed to it by the Third Circuit.

The Third Circuit's narrow definition of an unlawful employment practice is inconsistent with the provisions of Section 703(h), 42 U.S.C. Sec. 2000e-2(h). That section prohibits more than the administration of a discriminatory employment test. It prohibits an employer from any "action upon the results" of such a test when used to discriminate because of race. The use of a discriminatory roster, as occurred here when persons other than the petitioners were hired or promoted, constitutes action upon the results of the test as much as the initial promulgation of the roster does. The respondents' promulgation of the rosters was only the first action taken on the results of the tests. Title VII is not so limited.

The Court of Appeals' distinction between the initial promulgation of a roster and its subsequent maintenance and use also ignores the plain language of Section 703(a(2) of Title VII, 42 U.S.C. Sec. 2000e-2(a)(2). The broad language of that section does not support any such distinction. It forbids the limitation, segregation or classification of applicants for employment which would deprive or tend to deprive them of employment opportunities. The three year maintenance of the hiring roster was as much a limit on the petitioners' opportunities for employment as was the initial decision to exclude them. So long as the respondents kept the roster in use, it would have been futile for the petitioners to reapply. Because of their exclusion from the roster, the petitioners remained limited, segregated and classified in a way that tended to deprive them of equal employment opportunities throughout the life of the roster.*

The remedy provisions of Title VII, contained in Section 706(g), 42 U.S.C. Sec. 2000e-5(g), also indicate that the maintenance of a discriminatorily created roster is as much an unlawful employment practice as its initial promulgation. If petitioners were required to file a discrimination charge within 180 days of the promulgation of the roster, they would not be entitled to more than 180 days of back pay, since the wrong against them would not have commenced more than 180 days before the charge. Instead, Section 706(g) limits back pay to a period no more than two years before the filing of a charge. It plainly contemplates that a charge can be filed two years and more after the unlawful employment practice first began to injure the plaintiff.

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* This is equally true of the petitioners who sought promotion and were placed on the roster but in too low a position to be promoted.

By confining the meaning of unlawful employment practice to the promulgation of the roster, the Third Circuit has contradicted the legislative history of Title VII. Where the occurrence of an unlawful employment practice comprises more than an isolated event, Congress has indicated that a more expansive reading of the timely filing requirement is appropriate.

> This subsection as amended provides that charges be filed within 180 days of the alleged unlawful

> employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts' maximizing the coverage of the law are not affected.

Final Conference Committee
Section-by-Section Analysis
of H.R. 1745, the Equal
Employment Opportunity Act
of 1972, 118 Cong. Rec.
7166, 7177*

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* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) is a case decided prior to the 1972 amendments that finds a continuing violation in a situation similar to the case at bar. In that case, the plaintiff was permitted to file a charge more than 90 days after he was last rejected for employment. His charge was nonetheless timely because he challenged a practice of barring black applicants that would have made his reapplication futile.

Further legislative history that contradicts the Court of Appeals' position is to be found in the interpretative memorandum of Senators Clark and Case, accompanying the adoption of Title VII in 1964. That memorandum explicitly recognizes that the use of employment waiting lists, which are quite distinct from seniority systems, violates Title VII.*

Given this express congressional purpose to provide aggrieved parties with the maximum benefit of the law, it makes very little sense to attribute to Congress the distinction between promulgation and maintenance on which the Court of Appeals relies. There is no apparent reason why Congress would have desired to prohibit the promulgation of discriminatory rosters, but would have welcomed their subsequent maintenance and use. The latter is as much a barrier to equal employment opportunity as the former. As this Court has recently noted, the purpose of the 180 day limit on filing charges was to prevent stale claims. Zipes v. Trans World Airlines, Inc., Nos. 78-1545, 80-951, 50 LW 4238 (Feb. 24, 1982). There is nothing stale about petitioners' claims so long as the respondents voluntarily maintain and use the rosters to the exclusion of the petitioners, as they did here.

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* However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.

110 Cong. Rec. 7213 (1964) quoted in Franks v. Bowman Transp. Co., 424 U.S. 747, 759 n.15 (1976)

The Court of Appeals' decision fails to recognize that a continuing practice can be as much an unlawful employment practice as an isolated incident. As a consequence, its position contradicts this Court's recent decision in Havens Realty

Corporation v. Coleman, No. 80-988, 50 LW 4232 (Feb. 24, 1982). In enforcing a parallel statutory filing period in Title VIII of the 1968 Civil Rights Act, 42 U.S.C. Sec. 3612(a), the Court concluded

> that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice. (Footnote deleted)
>
> 50 LW at 4237

The petitioners in this case, of course, were not challenging just the isolated incident of the promulgation of the rosters, but the maintenance and use of the rosters as well. The maintenance and use of the rosters deprived them of employment opportunities just as effectively as the initial promulgation of the rosters, if not more so.

The Court of Appeals' position results from a fundamental misapplication of

Delaware State College v. Ricks, 449 U.S. 250 (1980). That case held only that a discharge, not alleged to be an instance of any ongoing practice was the event that started the running of the Title VII statute of limitations. *Ricks* did not define what type of conduct is continuing in nature and thus subject to a timely charge so long as the conduct continues. *Havens* is more pertinent to this issue than *Ricks*. The maintenance and use of the rosters in the case at bar are the Title VII equivalent of the racial steering claim in *Havens*, and thus subject to a timely charge. They are not equivalent to the discharge in *Ricks*, and the Court of Appeals erred when it determined that *Ricks* controlled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

Dated: April 12, 1982

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2003 & 81-1133

BRONZE SHIELDS, INC., PERCELL GOODWYN, RAMON GONZALEZ, HIPOLITO HERNANDEZ, FRANK HOWARD, JR., WILLIE C. JACKSON, JOHNSON LIVINGSTON, CLAUDE PITTMAN, JOHN W. REID, WILLIE C. SANDERS, MARVIN E. THOMAS, ALONZO WILLIAMS, RUBIN J. BATTLE, FLOYD BOSTIC, JR., LYNETTE CRAWFORD, CHARLES HARRIS, OLIVIA HOWARD,

Appellants

v.

THE NEW JERSEY DEPARTMENT OF CIVIL SERVICE, RALPH P. SHAW, Chief Examiner of the Department of Civil Service, THE NEW JERSEY CIVIL SERVICE COMMISSION, S. HOWARD WOODSON, President of the Civil Service Commission, THOMAS DeLUCA, JOHN HOLDEN, MATTHIAS RODRIGUEZ AND CHARLES WALTHER, Commissioners of the Civil Service Commission, THE CITY OF NEWARK, NEW JERSEY, a municipal corporation, JOHN REDDEN, DIRECTOR of the Newark Police Department

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D. C. Civil No. 72-2022)

Argued September 17, 1980

Before VAN DUSEN, WEIS and HIGGINBOTHAM,
Circuit Judges

(Opinion filed December 1, 1981)

Jonathan M. Hyman, Esq. (Argued), and
Elizabeth M. Schneider, Esq.,
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Newark, New Jersey
and
Jack Greenberg, Esq., and
O. Peter Sherwood, Esq.,
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Erminie L. Conley,
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Peter J. Calderone,
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Trenton, New Jersey,
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John T. Teare, Esq.,
Acting Corporation Counsel;
Matthew J. Scola, Esq.,
Assistant Corporation Counsel (Argued);
Newark, New Jersey,
Attorneys for Appellees,
City of Newark and Redden

OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

Plaintiffs charged defendants in a two-count complaint with discriminating on the basis of race and ethnic origin in the hiring and promotion of police officers in the Newark, New Jersey, police department. Plaintiffs allege defendants have violated 42 U.S.C. §1981 (count

I)[1] and Title VII, 42 U.S.C. §2000e *et seq*. (count II). The district court granted defendants' motion for summary judgment on the §1981 claim because plaintiffs had failed to allege or demonstrate any intent on the part of defendants to discriminate.[2] Intentional discrimination, the district court held, is a necessary element of a §1981 cause of action. The district court dismissed the Title VII claim because plaintiffs had not filed charges with the Equal Employment Opportunity Commission ("EEOC") within the statutorily required 180 days.[3] Plaintiffs appeal both the summary judgment granted on count I and the dismissal of their claim under count II. We affirm the district court action on count I as to all except the Newark defendants (see page 4 below) and on count II as to all defendants.

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[1] Count I also included allegations based on 42 U.S.C. §1983 and the Thirteenth and Fourteenth Amendments. Summary judgment in favor of defendants was granted on these other claims also. Plaintiffs do not raise these claims on appeal.

[2] See judgment of April 29, 1980 (A 259) in accordance with *Bronze Shields v. New Jersey Dept. of Civil Serv.*, 488 F.Supp. 723 (D.N.J. 1980). On May 7, 1980, plaintiffs moved, pursuant to F. R. Civ. P. 59(a), to vacate the above judgment and to amend the complaint to include a new paragraph 42A as follows:

> "The defendants have engaged in the aforesaid actions with the purpose and effect of depriving the members of the plaintiff class of equal employment opportunity because of their race or national origin."
> (A 261)

This motion was denied by order filed June 12, 1980 (A 262).

[3] The court's dismissal of the Title VII cause of action followed its decision to deny plaintiffs' motion for certification of a class. It is in the court's opinion denying class certification, filed February 23, 1979, that the court concluded the EEOC charges had not been timely filed. The order dismissing count II was entered on April 2, 1979.

We note that Judge Meanor's opinion of February 23, 1979, at note 1 (130A) refers to a pending pattern or practice suit brought by the Government. See *United States v. State of New Jersey, et al.* (D.N.J., Civil No. 79-184), under which broad relief would apparently be available to persons in the plaintiffs' class qualifying under Title VII. See *Teamsters v. United States*. 431 U.S. 324 (1977).

I. FACTS

To become a Newark police officer an applicant must first pass a written examination administered by defendant New Jersey State Department of Civil Service ("State Civil Service"). If the applicant passes this examination, he or she must pass a physical and medical examination, again given by the State Civil Service.[4] Those who successfully complete these examinations are placed on an eligibility roster in the order in which they scored on the written test.[5] This roster is distributed to the various municipalities, including defendant City of Newark ("Newark"). Defendant Newark then screens all those applicants listed on the eligibility roster. This screening includes, but is not limited to, an investigation of the applicant's character, personal life, reputation, a personal interview, and a psychiatric examination. Any applicant who does not withstand this screening process is removed from the roster. Newark hires recruits for its police department as needed from the eligibility roster in the order on the list.

Defendant State Civil Service also prepares an eligibility roster for the promotion of officers within municipal police departments. This roster is compiled on the basis of a written examination, years in service, and a service rating.

Plaintiffs include Bronze Shields, Inc., a non-profit New Jersey corporation whose purpose is to eliminate racial discrimination against policemen generally and, more specifically, to promote the employment and promotion of black police officers within the Newark police department. Individual plaintiffs include several applicants for the position of police officer in Newark who either failed the written civil service examination (Olivia Howard, Crawford, and Jackson), the physicial or medical examination (Gonzalez and Hernandez), or the screening carried out by Newark (Livingston, Thomas, and Pittman). Plaintiffs Reid, Williams, and Frank Howard are Newark police officers who, for a variety of reasons, defendants did not place on the list of those eligible for promotion.

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[4] This is a simplified explanation of the requirements set out in N. J. Admin. C. tit. 4:1-8.1 *et seq.*

[5] Veterans, however, are placed at the top of the list as they have an absolute preference. N. J. Admin. C. tit. 4:1-11.2.

Defendants include the State Civil Service which is responsible for the development and administration of standards, including examinations, that condition the hiring and promotion of municipal police officers throughout the State of New Jersey. N.J.Admin.C. tit. 4:1-3.5. Defendant New Jersey State Civil Service Commission is subsumed under the State Civil Service. N.J.Admin.C. tit. 4:1-3.1. These defendants, and the individual defendants employed by the state, are referred to as the state defendants. The remaining two defendants, Newark and the supervisor of the Newark police department, are, in the following discussion, referred to collectively as Newark. Newark uses the state-prepared eligibility lists and its own screening procedures to determine the candidates eligible for hire by the police department.

Because the allegations in plaintiffs' complaint are important to the determination of all the issues presented, we describe them in detail. Plaintiffs first charge both Newark and the state defendants with racial discrimination for their respective roles in either promulgating or using the eligibility roster for the hiring of Newark police officers. The eligibility roster, as initially published by the State Civil Service, is based on written, physical and medical examinations. The written examination, plaintiffs charge, has a disproportionate impact on minorities: a larger percentage of blacks and Hispanics who take the examination fail as compared to whites. For those applicants who voluntarily disclosed their race, the following passed the civil service examination:

	White Male		Black Male		Spanish-speaking Male	
Test Date	No. Passing	% Passing	No. Passing	% Passing	No. Passing	% Passing
5/ 8/72	567	43%	27	17%	6	10%
6/19/72	233	60.8%	13	25%	3	100%
7/17/72	614	66.1%	63	28.6%	16	25%
9/22/72	236	62.3%	5	25%	3	25%
11/18/72	770	72.4%	78	39.8%	29	35.8%
3/19/73	709	55.4%	21	20.6%	7	18.4%
5/23/73		49.4%		19.4%		31.9%
8/ 6/73		62.8%		28.1%		24.8%
4/15/74	390	44%	6	13%	4	16%
7/15/74	633	67%	16	25%	16	45%
6/21/75		36.8%		14.5%		11.3%

The state-administered physical examination, plaintiffs contend, excludes a disproportionate number of Hispanic applicants because it requires that all candidates be 5 feet 7 inches tall. The two contested examinations, along with a medical examination, provide the basis for the roster promulgated by the state defendants and used by the Newark police department. The use of this eligibility roster, plaintiffs allege, results in a pattern of unlawful employment discrimination on the basis of race and ethnic origin. Newark, then, is charged with discrimination for its use of the eligibility roster; the state related defendants are charged with discrimination for the promulgation of the offending list.

Plaintiffs have charged Newark alone with employment discrimination because of the screening procedures it uses to further reduce the number of candidates on the eligibility roster. These screening procedures, only vaguely set out in the complaint, allegedly have a disproportionate impact on blacks and Hispanics, are not job related, and are applied arbitrarily.

Both the state defendants and Newark are accused of discriminating for their part in the promulgation or use of the eligibility roster used to promote, as compared to hire, officers within the Newark police department. New Jersey law, N.J.Admin.C. tit. 4:1-8.4.-6, requires that the State Civil Service consider three factors in compiling the eligibility list for promotions: number of years in service, service rating given by a supervisor, and score on a written examination. Consideration of years in service, plaintiffs claim, continues the effects of past discrimination. The service rating is a discretionary decision which, plaintiffs argue, reflects the bias and prejudice of the generally white decision maker. Finally, plaintiffs charge that the written promotion examination, administered by the State Civil Service, has a disproportionately negative effect on the promotional opportunities for blacks and Hispanics.

II. THE PROCEDURAL HISTORY

Plaintiffs initially filed their complaint in 1972, alleging discrimination by defendants in violation of 42 U.S.C. §§1981 and 1983 and the Thirteenth and Fourteenth Amendments of the Constitution. No claim based on Title VII was made at that time. On November 26, 1974, the district court issued a preliminary injunction in favor of plaintiffs. This injunction required Newark to hire one black or Hispanic police officer for every two white officers hired.[6]

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[6] This injunction was issued on the then well-founded belief that constitutional claims of racial discrimination in employment do not require a showing of discriminatory intent. Prior to the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), this Court of Appeals, like most others, held that a claim under §1981, like one under Title VII, required only a showing of discriminatory impact, and not discriminatory intent. *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371, 373 n.4 (3d Cir. 1974). The Court in *Washington* admittedly rejected the generally accepted rule when it held that a showing of discriminatory intent was required for all constitutionally based claims of discrimination. *Washington v. Davis, supra* at 244-45.

The Supreme Court announced its decision in *Washington v. Davis*, 426 U.S. 229 (1976), in June 1976. The Court in *Washington* required proof of intentional discrimination for constitutionally based claims of discrimination. *Washington v. Davis, supra* at 247-48. Because plaintiffs had not alleged any intentional discrimination, defendants moved to dismiss. The district court stayed the motion to await the outcome of a charge filed by plaintiffs with the EEOC challenging the same employment and promotion practices.

Six individual plaintiffs filed employment discrimination charges against defendants with the EEOC in July 1976, approximately one month after the announcement of the *Washington* decision. After receiving right to sue letters, these individuals amended the complaint and added count II, the claim based on Title VII. It is this amended complaint which is being considered here.

The district court first addressed the Title VII claim. On March 12, 1979, the court denied plaintiffs' motion to certify a class since plaintiffs had failed to file charges with the EEOC within the required 180 days.[7] Because of the untimely filing, plaintiffs' Title VII cause of action, count II, was dismissed on April 2, 1979.

The district court then returned its attention to the original count I, the §1981, §1983, and Thirteenth and Fourteenth Amendment claims.[8] The court entered summary judgment for defendants on count I on April 29, 1980. It held that claims based on §1981, §1983, or the Fourteenth Amendment[9] all require intentional discrimination as an element of the cause of action. Because no allegation or showing of intentional discrimination had been made, plaintiffs' count I claims could not withstand a motion for summary judgment.

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[7] As the district court correctly noted, unless plaintiffs have a cause of action in their own right, they cannot be certified as representatives of a class. *Sosna v. Iowa*, 419 U.S. 393 (1975).

[8] The count I claims had already been dismissed against the New Jersey Department of Civil Service and the New Jersey Civil Service Commission. Certain individual defendants had been substituted. See note 2 of the district court's opinion at 488 F.Supp. 723, 725 (D.N.J. 1980).

III. JURISDICTION

We first address this court's jurisdiction. Plaintiffs initially filed a notice of appeal on July 7, 1980, from the orders refusing to vacate the grant of summary judgment on count I and the dismissal of count II. The orders appealed from, however, did not rule on all attorneys' fees which plaintiffs had requested in their complaint. After the grant of summary judgment and dismissal, plaintiffs filed a separate petition for counsel fees which was denied by the district court on December 1, 1980. Plaintiffs filed a second appeal, No. 81-1133, on December 22, 1980, which did not challenge the denial of counsel fees but repeated the same grounds set out in the July 7, 1980, notice of appeal. Admittedly this second appeal was filed as a cautionary measure to insure that the court had jurisdiction in the event that the July 7, 1980, notice of appeal was premature.

The plaintiffs' apprehensions were well founded because in *Croker v. Boeing Co., etc., et al.*, —— F.2d —— (Nos. 80-1569/1570, 3d Cir., filed September 30, 1981, at II), this court concluded that an appeal taken before attorney's fees were determined was premature.

Plaintiffs' motion to consolidate the appeals at Nos. 80-2003 and 81-1133 has been granted, and hence this court has jurisdiction under No. 81-1133 to review the order filed December 1, 1980 (Document 141 in the District of New Jersey Civil No. 72-2022), and the orders included in the July 7, 1980, notice of appeal since they were repeated in the December 22, 1980, notice of appeal. The appeal at No. 80-2003 will be dismissed as premature in view of *Croker, supra*. We turn then to the merits.

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[9] The district court's opinion addresses only the §1981 claim but does dispose of the §1983 and Fourteenth Amendment claims in a footnote. 488 F.Supp. 723, 731 n.18. No mention of the Thirteenth Amendment claim was made, but we assume, because it is not contested on appeal, that this claim was implicitly disposed of in the summary judgment order.

IV. THE TITLE VII CLAIM

Plaintiffs on appeal contest the district court's conclusion that the charges, filed with the EEOC against the state defendants and Newark, were untimely. The only charges which are of concern here are those based on the defendants' promulgation and use of the allegedly discriminatory hiring roster, not the promotion roster. The district court found that, of the plaintiffs who had filed Title VII charges, none had standing to challenge the eligibility lists used for promotion purposes[10] and plaintiffs do not contest this holding on appeal.[11] To further clarify what Title VII claims are not involved here, we note that plaintiffs do not argue they have standing to contend that the screening procedures used by Newark violate Title VII.[12] The only charges which we must determine as timely or untimely filed are those alleging discrimination resulting from the promulgation or use of the eligibility roster for hiring.

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[10] None of the plaintiffs took and failed the examination for promotion (A 146).

[11] Plaintiffs claim on appeal that the use of the eligibility rosters for promotion presents a continuing violation. Because plaintiffs do not have standing to assert the claim, however, we need not consider this issue.

[12] Plaintiffs are without standing because none of the plaintiffs who filed charges with the EEOC were adversely affected by the screening. Plaintiffs Olivia Howard and Crawford took and failed the civil service examination so never reached the screening stage. The remaining plaintiffs who filed charges with the EEOC all survived the screening process and were hired as Newark police officers.

Pursuant to section 706(e) of Title VII, 42 U.S.C. §2000e-5(e),[13] a charge of discrimination must be filed with the EEOC within 180 days after the alleged unlawful employment practice occurred.[14]

The specific facts pertinent to the timely filing issue are as follows. Plaintiffs Olivia Howard and Crawford took the examination for police officer candidates on January 18, 1975. In February 1975, they were notified they had failed. The State Civil Service promulgated the eligibility roster on May 3, 1975. This roster remained in effect for three years. Newark only used the roster once when it hired 27 recruits for police officer training in November 1977. Plaintiffs filed charges of discrimination with the EEOC on July 9, 1976.

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[13] Title VII §706(e), 42 U.S.C. §2000e-5(e) provides:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

[14] The 180-day limit applies because all the plaintiffs initially filed charges with the EEOC. A 300-day filing period would have aplied had plaintiffs initially filed with the state agency. 42 U.S.C. §2000e-5(e).

The district court held that the allegedly discriminatory employment practice occurred with the promulgation of the eligibility roster published on May 3, 1975. The plaintiffs' EEOC charges, filed in July 1976, were not filed within 180 days of May 3, 1975, and therefore were untimely. Plaintiffs challenge this holding and argue that their filings were timely under either (A) the continuing violation theory or (B) the doctrine of equitable estoppel.[15]

A. *The Continuing Violation Theory*

Plaintiffs first rely on the continuing violation theory to support the allegation that their discrimination charges were timely filed. Plaintiffs assert that the eligibility roster, based on the results of the allegedly discriminatory civil service examination, constitutes an unlawful employment practice which continued to violate Title VII for as long as the roster was in effect. The roster was in effect from May 1975 until at least November 1977. Plaintiffs filed charges with the EEOC in July 1976. Because they filed during the roster's effectiveness, plaintiffs assert their filings were timely.

The continuing violation theory has attracted widespread attention by commentators,[16] and has been employed by courts to expand the filing period available to

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[15] The district court issued two unpublished opinions on the Title VII cause of action. The first opinion discusses continuing violations (A 129, *et seq.*), the second deals with equitable estoppel (A 154, *et seq.*).

[16] Below are listed just a few of the more recent law review commentaries on the continuing violation theory. *The Continuing Violation Theory*, 31 Hastings L. J. 929 (1980); Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L. J. 811 (1979); *Title VII and the Continuing Violation Theory: A Return to Congressional Intent*, 47 Fordham L. Rev. 894 (1979); *Note: Continuing Violations of Title VII: A Suggested Approach*, 63 Minn. L. Rev. 119 (1978).

Title VII complainants.[17] The liberal application of the congressionally mandated filing period is consistent with the remedial purposes of Title VII and the liberal interpretation to be given to all Title VII provisions.[18] The expansive application of the 180-day filing limit has been justified as permitting claims filed by lay employees unversed in the procedural niceties of the law.[19] Indeed, a Senate Conference Committee report specifically recognized and approved the courts' expansion of the statutory filing period through the use of the continuing violation theory.

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law

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[17] *Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168 (3d Cir. 1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Guardians Ass'n of New York City v. Civil Serv.*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3931 (U.S., June 15, 1981); *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978); *Clark v. Olinkraft Inc.*, 556 F.2d 1219 (5th Cir. 1977); *Cedick v. Hamiltonian Federal Savings & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C.Cir. 1973); *Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969).

[18] *Hart v. J. T. Baker Chemical Corp.*, 598 F.2d 829, 831 (3d Cir. 1979); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977). 29 C.F.R. §1601.34 (1980) provides that the "rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII."

[19] *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978).

> which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected."

118 Cong. Rec. 7167. The Senate accepted this report by a vote of 62 to 10. 118 Cong. Rec. 7167, 7170. Finally, this court has recognized the continuing violation theory in Title VII cases, *see Masco v. United Airlines*, 574 F.2d 1127 (3d Cir. 1978); *Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168 (3d Cir. 1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), as have numerous other circuits.[20]

The continuing violation theory, however, cannot be considered only in the expansive light of extending the filing period in order to protect a person's civil rights. Confronting and limiting the continuing violation theory is the explicit statutory 180-day limit, enacted by Congress to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980), citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975); *see United Air Lines v. Evans*, 431 U.S. 553 (1977). Although many district courts and courts of appeals have favored the expansive interpretation of the continuing violation theory, the Supreme Court has, in its two most recent opinions on the subject, refused to apply the continuing violation theory. *Delaware State College v. Ricks, supra*; *United Air Lines v. Evans, supra*. Instead, as indicated above, the Court has emphasized the congressional intent to limit an employer's liability for stale claims.

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[20] See cases cited in note 17, *supra*.

> "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975); see *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977)."

Ricks, supra at 256-57. *Cf. International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

Because the Supreme Court's recent decisions, particularly *Delaware State College v. Ricks, supra*, persuade us that the use of the eligibility roster does not constitute a continuing violation, we forego discussing all of the cases decided before *Ricks, supra*, on the subject.[21]

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[21] For example, the recent Second Circuit case of *Guardians Ass'n of New York City v. Civil Serv.*, 633 F.2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U.S.L.W. 3157 (Nos. 81-431, 81-432, Aug. 31, 1981), involved an issue similar to the one presented here. That court held that the repeated use of an eligibility roster, based on a discriminatory written examination, to make hiring decisions constituted repeated violations of Title VII. We have considered carefully the January 20, 1981, letter from plaintiffs' counsel and cannot agree with the contention at page 3 that "*Ricks* does not protect the defendants in this case from judicial correction of their wrongful practice."

The dissent incorrectly contends at typescript page 9 that this decision "flatly refuses to discuss" the cases of other circuit courts of appeals, such as *Guardian Ass'n of New York City v. Civil Serv., supra*, on which the dissent relies, even though the first 12 lines of this footnote and 13 lines of note 23 below refer to facts which distinguish that case from this record and point out places in this record where counsel for appellants' arguments based on that case are enumerated. That case is also cited in the discussion of the continuing violation theory at typescript page 12. See note 17 above and text related to that note. Essentially, our difference with the dissent centers on the effect which *Ricks* has on *Guardian* and similar cases.

The plaintiff in *Ricks*, a black Liberian, was formally denied tenure on March 13, 1974. Delaware State College, like many other educational institutions, does not immediately discharge faculty members who are denied tenure. Rather, such faculty members are offered one-year terminal contracts. Termination of employment, however, is a delayed but inevitable consequence of an unfavorable tenure decision. On June 26, 1974, Ricks was offered, and he accepted, a terminal, one-year contract. Meanwhile, Ricks filed a grievance which was denied on September 12, 1974. He filed charges with the EEOC on April 4, 1975. The district court determined that the filing period started to run on June 26, 1974, the date plaintiff was offered and accepted his terminal contract. The offer and acceptance of the terminal contract, as explained by the district court and accepted by the Supreme Court, marked the latest time at which Ricks knew the College was going to both deny him tenure and terminate his employment. The district court dismissed the case because plaintiff had failed to file within 180 days of accepting the terminal contract. The Supreme Court upheld the district court's dismissal, reversing this court's decision.

According to the Supreme Court in *Ricks*, *supra* at 257, to determine the timeliness of an EEOC complaint, a court must "identify precisely the 'unlawful employment practice' of which [plaintiff] complains." In *Ricks* the plaintiff challenged the decision to deny him tenure. The Supreme Court held that the filing limitation period commenced at the time the tenure decision was made and fully communicated to Ricks. "That is so even though one of the *effects* of the denial of tenure — the eventual loss of a teaching position — did not occur until later. . . . The emphasis is not upon the effects of earlier employment decision; rather, it 'is [upon] whether any present *violation* exists.' " *Id.* at 257 (emphasis in original), citing *United Air Lines v. Evans*, 431 U.S.

553, 558 (1977). *See also Masco v. United Airlines*, 574 F.2d 1127 (3d Cir. 1978). The Court explained that

> ". . . termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a one-year 'terminal' contract with explicit notice that his employment would end upon its expiration."

Ricks, supra at 257-58.

Returning to the case before us, we must likewise identify precisely the unemployment practice of which plaintiffs complain and separate it from the inevitable, but neutral, consequences of the allegedly discriminatory practice. Plaintiffs complain of defendants' refusal to place them on the hiring roster. Accepting plaintiffs' allegations as true, the roster, because it arises from examinations which have a discriminatory impact, could constitute an unlawful employment practice. Plaintiffs received formal notice that they were not on the eligibility roster on May 3, 1975, the date of its formal promulgation. As of that date at the latest,[22] plaintiffs knew they would not be hired by the Newark police department for the next three years because they were not on the eligibility roster. Plaintiffs, however, did not file within 180 days of May 3, 1975.

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[22] Plaintiffs received actual notice of their failure in February 1975.

Plaintiffs argue that Newark continued to discriminate against them by its use of the eligibility roster. This argument is unpersuasive. First, Newark never used the list prior to plaintiffs' filing charges with the EEOC.[23] Second, even if Newark had used the list, plaintiffs do not allege that Newark would have followed anything but a neutral, non-discriminatory procedure in hiring from the list. Newark's policy was simply to hire in order from the list.

The statute (42 U.S.C. §2000e-5(e)) requires that "the person aggrieved" file charges within 180 days of "the alleged unlawful employment practice."[24] This statutory language indicates that some act must aggrieve the complaining party. The record does not show that the defendants acted in any way which aggrieved plaintiffs within the 180 days before plaintiffs filed their EEOC charge. The only act of which plaintiffs complain was the promulgation of the eligibility roster on May 3, 1975. Plaintiffs' EEOC charge was filed more than a year later, in June 1976, far more than 180 days after the list's promulgation, and therefore was untimely.

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[23] The eligibility roster was published in May 1975; plaintiffs filed with the EEOC in July 1976; and Newark's first and only use of the allegedly offending roster was in November 1977. Under the Second Circuit's holding in *Guardians Ass'n of New York v. Civil Service*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3931 (U.S., June 15, 1981), had Newark used the list and hired recruits within 180 days before plaintiffs filed, their filings would have been timely. This is not the situation here. Newark did not hire any police officers from the roster prior to plaintiffs' filing of their EEOC charges. Hence, even if we followed the theory of the *Guardians* case, there would have been no compliance with the requirement of filing within 180 days after the discrimination had occurred. In *Firefighters Institute for Racial Equality v. City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979), the court held that although no promotions were granted or denied, the use of a testing device to make up a promotion list was a discriminatory act which established liability.

[24] See note 13 and text incident to that note.

Newark's non-discriminatory policy as to the use of the roster is similar to Delaware State's non-discriminatory policy in discharging all faculty denied tenure. *See Ricks, supra* at 257-58. Newark's refusal to hire plaintiffs, like Delaware College's discharge of Ricks, "is a delayed, but inevitable consequence" of the allegedly discriminatory employment procedure — here a specific, identifiable act, the promulgation of the hiring roster. It is unlike, therefore, a continuing practice such as in *Bethel v. Jendoco, supra*, which manifested itself only in individual hiring rejections.

Thus, we reject plaintiffs' argument that the continuing violation theory applies to the facts of this case.

B. *The Equitable Tolling Argument*

Plaintiffs assert that their EEOC charges were timely filed because, for several reasons, the 180-day limit was equitably tolled.

The filing limits under Title VII are not jurisdictional and are subject to equitable tolling. *Hart v. J. T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976); *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). While recognizing that the filing limits of Title VII can be equitably tolled, we find no justification in equity to toll the filing limitation in this case. *Cf. School District v. Marshall*, 657 F.2d 15 (3d Cir. 1981).

Plaintiffs argue that they relied to their detriment on the established law prior to the Supreme Court case of *United Air Lines v. Evans*, 431 U.S. 553 (1977). This supposedly well-established law permitted them to file EEOC charges at any time while the violation continued. *Evans*, plaintiffs claim, reversed the prior law and precluded their reliance on the continuing violation theory.[25] Plaintiffs explain that if *Evans* is applied to this case, they will be unfairly penalized for relying on what had been clearly established law. Such an inequitable result, plaintiffs argue, is precluded by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

In *Chevron*, when the plaintiff initially filed suit, it was commonly recognized that the three-year admiralty statute of limitations controlled his cause of action. Defendants did not question the timeliness of the filing. During pretrial discovery, the Supreme Court decided a case which reversed the established law and held that the shorter, one-year state statute of limitations applied. Although plaintiff had filed suit more than a year after his cause of action arose, the Court exercised its equity powers and refused to apply the newly announced law on limitations retroactively to plaintiff's case. His filing was held to be timely.

Plaintiffs cannot rely on *Chevron* for two reasons. First, *Evans* did not reverse clearly established law. The continuing violations theory was in its embryonic stages at the time the plaintiffs supposedly relied on it in 1975. Since then, the theory has been presented to numerous courts but has been erratically and inconsistently applied.[26] Reliance on such an uncertain doctrine to delay filing, when such a delay was not mandated by other considerations, was not reasonable. Second, plaintiffs themselves admit that their delay in filing resulted, not from a reliance on the continuing violation law prior to *Evans*, but rather from their mistaken belief that the original court action, based on §1981, §1983 and the Thirteenth and Fourteenth Amendments, would provide complete relief.[27] Plaintiffs apparently chose to rely on this court civil action rather than go through the often lengthy administrative proceedings which are a part of the Title VII process.

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[25] Plaintiffs implicitly admit that *Evans* did not clearly change the law of continuing violation. Their argument is premised on the condition that only if we read *Evans* as making their filings untimely did *Evans* change the law. While *Evans* narrowed the scope of the continuing violation theory, we do not interpret it, nor has any other court interpreted it, as extinguishing the continuing violation theory completely.

[26] See the law review commentaries cited in note 16, *supra*.

Equity does not provide for those who put all their eggs in one basket and refuse to take advantage of alternative avenues to relief. Plaintiffs should be encouraged to vindicate their rights, not only by means of the courts, but also by use of administrative processes. We therefore will not rely on the equitable principle utilized in *Chevron* to save plaintiffs' case.

Plaintiffs next argue that the filing period should be equitably tolled because the parties had been litigating the same issues ever since 1972.[28] This litigation, plaintiffs contend, gave notice to defendants of the employment discrimination charges and so satisfied one of the primary purposes behind the limited filing period — that of notifying the defendant so that necessary evidence and testimony could be preserved. *Hart v. J. T. Baker Chemical Corp.*, 598 F.2d 829, 833 (3d Cir. 1979). We must, however, consider other purposes behind Title VII. Congress intended to limit an employer's liability by restricting the filing period. *Ricks, supra* at 257-59. It also intended that, by having plaintiffs file with the EEOC before going to court, both parties would be subjected to the administrative pressure to reconcile their dispute. Here, by delaying filing, plaintiffs avoided the administrative pressures and, if they succeed, would expand the time period during which an employer is liable. These other purposes behind Title VII outweigh the purpose of notifying the defendant of upcoming litigation. Therefore, equity should not intervene.

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[27] Plaintiffs' Opening Brief at 17.

[28] The litigation to which this refers is count I of the complaint in this case, filed in 1972.

Furthermore, the holding in *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975), indicates that plaintiffs' equitable tolling argument is without merit. In *Johnson,* the Court concluded that the filing of Title VII charges with the EEOC does not toll the statute of limitations in a suit brought under §1981. *Id.* at 461. This conclusion was based on the view that "the remedies under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct and independent." *Id.* Because the claims are independent, the filing of charges under §1981 will not toll the filing limit under Title VII.

Courts often rely on equity in Title VII cases where complainants are "lay persons unfamiliar with the complexities of the administrative procedures." *Hart v. J. T. Baker Chemical Corp.,* 598 F.2d 829, 832 (3d Cir. 1979). Plaintiffs have been counseled since 1972 by able attorneys and so cannot rely on this as a basis for equity.

We do not decide whether, as defendants suggest, equitable tolling may only be invoked where the employer has, either through overreaching or concealment, impeded a plaintiff's prosecution of his Title VII claim. We simply hold that, under the facts of this case and for the reasons given above, the equities do not demand the tolling of the 180-day filing limitation.

Thus we affirm the district court's dismissal of plaintiffs' Title VII claim as untimely. The effectiveness of the eligibility roster does not, standing alone, constitute a continuing violation of Title VII. Plaintiffs have not presented any justification for equitably tolling the 180-day filing period.

V. THE §1981 CLAIM

Plaintiffs appeal the district court's grant of summary judgment for defendants on count I, the cause of action premised on 42 U.S.C. §1981. The district court held that intentional discrimination is a necessary element of a §1981 claim and that disproportionate impact, standing alone, does not give rise to an inference of intentional discrimination. For the reasons stated in *Croker, et al. v. The Boeing Co., etc., et al.*, at part III, —— F.2d —— (3d Cir. Nos. 80-1569/1570, Sept. 30, 1981), we agree.

The district court further found that, because plaintiffs had only alleged and presented evidence of disproportionate impact, both defendants were entitled to summary judgment. We agree for the most part and will affirm the summary judgment in favor of the State Civil Service. We will, however, reverse in part the summary judgment in favor of Newark.

Plaintiffs did not allege, either initially or when they amended the complaint in 1977, that any of the defendants intended to discriminate. Given the liberal interpretation to be accorded pleadings, *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), we will explore the facts as stated in the complaint and affidavits to determine whether any allegations, together with a showing of disproportionate impact, could establish the necessary intent.

Our examination of the record as to the state defendants has not revealed facts which, even in conjunction with a showing of disproportionate impact, would support an allegation of intentional discrimination. The summary judgment for the state defendants will be affirmed.

Plaintiffs argue that Newark intentionally discriminates by means of its screening process. The screening process does eliminate a disproportionate number of blacks and Hispanics as compared to whites from the hiring roster (Plaintiffs' Complaint, ¶34 at A 22; Affidavit of Purnell Benson, A 225; Supplemental Answers to Plaintiffs' Interrogatories, A 239). Furthermore, the screening procedure is "susceptible of abuse" on the basis of racial discrimination. *See Castenda v. Partida*, 430 U.S. 482, 494 (1977). Newark apparently can discover the applicant's race in a variety of ways, including a personal interview. Armed with this knowledge, Newark could, given the opportunity, make discriminatory hiring decisions. Allegedly, the person authorized to remove applicants from the eligibility roster has "wide discretionary powers which are exercised arbitrarily and without regard to ascertainable standards" (Plaintiffs' Complaint, ¶34-C, at A 22).[29] If this is true, Newark could intentionally discriminate by means of the screening procedure used in hiring police officers. Had plaintiffs been allowed to present evidence on the mechanics and actual operations of the screening process, the fact finder might have been persuaded to infer Newark intended to discriminate in hiring police officers.

We hold that plaintiffs' complaint and supporting affidavits, because they allege disproportionate impact and opportunity to intentionally discriminate by the exercise of arbitrary discretion, entitle plaintiffs to an opportunity to support the charge of intentional discrimination against Newark.[30] This holding does not mean that disproportionate impact, coupled with an opportunity to intentionally discriminate, constitutes discriminatory intent as a matter of law. To prove intentional discrimination, the opportunity to discriminate must be shown to have been exploited. The case before us, however, has not progressed to the proof stage. It must be remembered that this case is here on appeal from an order granting summary judgment for defendants on the §1981 cause of action. Because this claim requires proof of intent, an element difficult to establish, summary judgment should be granted with caution. *Foster v. Swift & Co.*, 615 F.2d 701, 702 (5th Cir. 1980); *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 997 (5th Cir. 1979).

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[29] Plaintiffs' complaint reads in part:

"34. On information and belief, defendant Redden and his agents and employees have discriminated against applicants in that the background investigation and interviews conducted by them exclude a disproportionate number of Black and Hispanic applicants in the following manner:

. . .

c) the investigators and the appointing authority generally have wide discretionary powers which are exercised arbitrarily and without regard to ascertainable standards.
d) the form required to be filled out by applicants inquires into matters irrelevant to the question of the fitness of the person to be a patrolman.

"35. The psychiatric examinations administered by defendant Redden, his agents and employees are not validated as job related, are culturally and ethnically biased, and, on information and belief, are administered in a discriminatory manner so as to exclude disproportionate numbers of black and Hispanic applicants."

Read in a light most favorable to plaintiffs, we find there is a dispute over a material fact: whether Newark intentionally discriminated on the basis of race by means of its screening procedure. The order granting summary judgment to defendant Newark and the superintendent of the Newark police department must, therefore, be vacated and the case remanded.

VI. CONCLUSION

The order of summary judgment on count I, the §1981 claim, granted to defendants New Jersey Department of Civil Service, New Jersey Civil Service Commission, and all individual defendants employed by either of these two defendants will be affirmed. The count I summary judgment order in favor of Newark and the director of the Newark police department will be reversed in part. On remand, the district court need only consider whether Newark intentionally discriminated during the applicable limitations period by means of its allegedly arbitrary and standardless screening procedures. The summary judgment for Newark based on its liability for using the eligibility rosters either for hiring or promotion will be affirmed.

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[30] We note that a similar arbitrary discretion is allegedly involved in the determination of the service rating, a factor involved in compiling the roster used for promotion of police officers. Plaintiffs' Complaint, ¶¶36 and 38 at A 23-24. No plaintiff complains that he was given an undeservedly low rating or that the rating given affected his opportunity for promotion. The only plaintiffs concerned with the promotion roster were not placed on the roster because they either did not pass the written examination or did not fulfill the years-in-service requirement. Plaintiff Bronze Shield may have members who were adversely affected but it made no allegations on this point. Plaintiffs are without standing to challenge the use of the service rating.

The dismissal of count II, the cause of action under Title VII, will be affirmed as to all defendants.

The motion to dismiss the appeal at No. 81-1133 will be denied.

A. LEON HIGGINBOTHAM, JR., dissenting and concurring.

This case presents two difficult issues for our consideration. The first involves deciding the timeliness of Title VII charges filed with the EEOC against the State of New Jersey and the City of Newark. The second concerns the applicable standard of proof to be applied to a 42 U.S.C. §1981 claim. Because I have concluded that the alleged acts of discrimination constitute a continuing violation, I dissent to the majority's conclusion that the EEOC charges were not filed timely. As to the §1981 issue, it is my belief that a showing of disproportionate impact satisfies §1981. However, since I am bound by our court's recent *en banc* decision in *Croker v. The Boeing Co. (Vertol Division)*, Nos. 80-1569/70 (3d Cir. filed September 30, 1981), holding that intentional discrimination must be shown in §1981 cases, I concur in the judgment of the majority.

I.

FACTS

The majority's opinion has cogently and lucidly set forth the complex factual and procedural history of this case. My recitation will be more in the nature of a summary than a disagreement with the facts which have been noted by the majority.

The New Jersey State Department of Civil Service administers a state-wide employment procedure consisting of a written test and a physical and medical examination. All applicants seeking to be police officers must pass the written component of the employment procedure before they can attempt to qualify physically and medically. The State Civil Service ranks the applicants on an eligibility roster according to their scores on the written test, except for veterans who receive an absolute preference. The eligibility list is then forwarded to the various municipalities seeking to hire police officers. In the case of the defendant, City of Newark, secondary screening procedures of eligible candidates are employed, including subjective background investigations, personal interviews and psychiatric examinations. Newark meets its needs for new police officers exclusively from the state promulgated list minus candidates who have failed the City's screening. A similar roster governs promotions and is compiled on the basis of a written examination, years in service and a service rating.

Plaintiffs in this action consist of black and Hispanic individuals who have taken and failed some portion of either the State Civil Service's examination relating to initial employment or promotion or Newark's secondary screening process and Bronze Shields, Inc., a non-profit New Jersey corporation dedicated to the eradication of racial discrimination in the employment and promotion of police officers in the Newark police department. In a single count complaint filed in 1972, alleging violations of 42 U.S.C. §§1981 and 1983 and the thirteenth and fourteenth amendments to the United States Constitution, the plaintiffs sued the State Civil Service, various state officials, the City of Newark and the supervisor of the Newark police department. The gist of the complaint was that both the Newark and the state defendants impermissibly discriminated against plaintiffs on the basis of race by employing an eligibility list premised on a written and physical examination which disproportionately excluded black and Hispanic candidates. It was further alleged that Newark's use of the screening process unlawfully discriminated against the plaintiffs. Finally, it was alleged that both the state and Newark defendants violated plaintiffs' rights by promulgating and using a discriminatory promotion list.

On November 26, 1974, the district court responded to the plaintiffs' complaint by issuing a preliminary injunction against the defendants. The injunction required Newark to adopt a hiring formula whereby one black or Hispanic candidate was to be hired for every two white candidates hired. This formula was intended to correct an imbalance in the percentage of black and Hispanic males who did not pass the written civil service examination.[1]

Approximately a year and a half after the lower court's injunction decision, the Supreme Court announced its decision in *Washington v. Davis*, 426 U.S. 229 (1976) requiring proof of intentional discrimination for fourteenth amendment based claims. One month after *Washington v. Davis* six individual plaintiffs filed charges with the EEOC. The plaintiffs did not allege intentional discrimination in their original complaint. The EEOC issued right to sue letters and the plaintiffs amended their complaint to add a second count based on Title VII.

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[1] The written examination was given 11 times between May 8, 1972 and June 21, 1975. For the eight tests given between May 1972 and July 1974, in which we have raw figures of the number of persons taking the exam and disclosing their race voluntarily, the following patterns emerge: White males — total number 7184, number passing 4152, % passing 57.8; Black Males — total number 859, number passing 229, % passing 26.7; and, Hispanic Males — total number 318, number passing 84, % passing 26.4.

On April 2, 1979 the district court dismissed the plaintiffs' Title VII count because the charges had not been filed with the EEOC within the statutorily mandated 180 days. The defendants moved for summary judgment on the remaining original count. The lower court granted the motion on April 29, 1980 holding that §1981, §1983 and constitutionally based claims all require a showing of intentional discrimination. The plaintiffs moved to vacate the summary judgment and to amend their complaint to allege purposeful discrimination. This motion was denied on June 12, 1980 and this appeal followed.

II.

TIMELINESS OF THE TITLE VII FILING (COUNT II)

The timeliness issue is presented to us by two plaintiffs who are members of the class in the present action and individual plaintiffs in a consolidated companion case before this court.[2] Olivia Howard and Lynette Crawford are black women who took and failed the written portion of the Civil Service examination in 1975. As a result of their failure to pass the test their names were not placed on the eligibility roster. This list was to have a three year life during which no new applications would be accepted. The list was officially promulgated on May 3, 1975 and lasted into 1978.

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[2] These two black, female applicants were named plaintiffs in the amended Count II. They attempted to allege sex discrimination as well as race discrimination in the amended complaint. Their motion to add the sex discrimination claim to Count II by amendment was denied and has proceeded in the separate case of Howard v. New Jersey Department of Civil Service, No. 79-2392.

The plaintiffs filed charges of discrimination with the EEOC on July 9, 1976, approximately 14 months after the list's publication. Newark hired from the list on only one occasion during the roster's three year life and that use occurred in November 1977. Thus, the plaintiffs filed beyond 180 days after the list's publication but *prior* to its first use.[3]

Plaintiffs advance two theories for why their otherwise late filing should be considered timely. They assert that the discriminatory test gave rise to a tainted civil service roster with a three year life. Thus, the discrimination inherent in the test results was embodied in the list for its life and constituted a continuing violation. Secondly, they argue that equitable considerations should have tolled the statutory filing period. While I agree with the majority's result in rejecting plaintiffs' tolling arguments, I am not persuaded by the majority's views on the continuing violation theory.

The majority opinion properly observes that this circuit and numerous other circuits have recognized the continuing violation theory in Title VII cases. Majority Opinion, Typescript at 14-15 citing cases and commentators. Nevertheless, on the authority of the Supreme Court's decisions in *Delaware State College v. Ricks*, 101 S.Ct. 498 (1980) and *United Air Lines v. Evans*, 431 U.S. 553 (1977), the majority seems to be sounding the death knell of the continuing violation theory. Neither *Ricks* nor *Evans* involved a situation in which the plaintiffs alleged a discriminatory act and were then barred from reapplying for the same position over the life of a civil service roster.

In *Evans*, the plaintiff was a female flight attendant who alleged that she was discriminatorily dismissed from her job in 1968 by United Air Lines. She did not file charges with the EEOC until 1973, one year after she was rehired by the airline. The Supreme Court assumed that her 1968 dismissal was in violation of Title VII and asked whether the employer committed "a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [the day of her rehiring]." 431 U.S. at 554. Justice Stevens observed that the plaintiff was hired as a new employee in 1972 and stated:

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[3] Had the plaintiffs filed first with a state equal employment commission the time limit would have been extended to 300 days. 42 U.S.C. §2000e-5(e). Since they did not, the 180 day limit is applicable. At any rate, the plaintiffs exceeded both time periods.

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
>
> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.

431 U.S. at 558 (footnote omitted). The Supreme Court concluded that the plaintiff having passed up the opportunity to file charges in 1968 could not reach the effects of the alleged discriminatory dismissal by filing five years later.

The majority miscontrues the gist of the plaintiffs' complaint in this case when it writes that they "complain of defendants' refusal to place them on the hiring roster." Majority Opinion, Typescript at 18. The plaintiffs complain not only that the allegedly discriminatory test kept them off the hiring roster but that the statutorily prescribed life of the list precluded Newark from hiring minority candidates via a non-discriminatory process. If the discrimination did occur, it was not merely when the list was promulgated. Rather, it occurred then and continued to occur as long as the civil service policy and practice of hiring exclusively from the allegedly tainted list barred the plaintiffs from an equal opportunity to be hired.

Likewise, in *Ricks,* the Supreme Court was not considering an allegation that Delaware State College had established a discriminatory policy or practice anything akin to a civil service examination and an employment roster. There, a black Liberian faculty member was denied tenure on June 26, 1974, was given a one year terminal contract for the 1974-75 school year, and was terminated as an employee on June 30, 1975. As a court of appeals, we held that for reasons of policy "a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer so long as he is still working, even though he has been told of the employer's present intention to terminate him in the future." *Ricks v. Delaware State College,* 605 F.2d 710, 712 (3d Cir. 1979) *quoting Bonham v. Dresser Industries, Inc.,* 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). We believed that, in academia as in business, decisions are often changed and it would be unwise to encourage the initiation of litigation prior to the end of the employment relationship. The end of employment rule had the benefit of fostering amicable relations between employers and employees as well as providing "a bright line guide" for when the time period began to run. 605 F.2d at 712.

The Supreme Court, in a 5-4 decision, reversed the decision of our court. Justice Powell, writing for the majority, held that June 26, 1974, the date on which Ricks was offered a terminal contract, was a valid starting point for the limitations period. It was at this point that the College "had established its official position — and made that position apparent to Ricks. . . ." 101 S.Ct. at 506.

Interestingly, the Court addressed Ricks continuing violation argument as follows:

> Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination not only motivated the College in denying him tenure, but also in terminating his employment on June 30, 1975. Tr. of Oral Arg., at 25, 26, 31-32. In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his one-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. *United Air Lines v. Evans*, supra, at 558. If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts.

> Indeed, the contrary is true. It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a one-year "terminal" contract, with explicit notice that his employment would end upon its expiration.

101 S.Ct. at 503-04 (footnote omitted). Contrary to the majority's view of *Ricks* in the present case, the Supreme Court did not reject the continuing violation theory, only its application to the pleaded facts before it.

In our case, the plaintiffs "have identified the alleged discriminatory acts that continued. . . ." They have alleged discrimination not only in the use of the test initially to form a roster but in the continued bar to equal employment which such a list presents. The case presented by our facts is entirely different in its effect and implications from those facts presented to the Supreme Court in *Ricks* and *Evans*. It is, in effect, closer to a case where an employer posts a sign which reads "Whites Only." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). A discriminatory civil service test operates to humiliate and exclude not only those who take it and fail but also has the effect of discouraging future applicants during the roster's life and beyond. As the Supreme Court cogently observed in *Teamsters:*

> The effects of and the injuries suffered from discriminatory employment practices are not always

> confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.

Id. See Roberts v. North American Rockwell Corp., No. 79-3424 (6th Cir. filed June 1, 1981) ("We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well." Slip Op. at 6).

The majority, relying entirely on *Ricks* and *Evans* which I believe are not controlling, flatly refuses to discuss those cases in which courts have applied the continuing violation theory to similar facts as presented here. Majority Opinion, Typescript at 16. For example, the majority in a footnote considers *Guardians Ass'n of New York City v. Civil Serv.*, 633 F.2d 232 (2d Cir. 1980) (petition for certiorari filed August 31, 1981) and concedes that it poses a similar issue to that presented by our case. They characterize the Second Circuit's decision as holding "that the repeated use of an eligibility roster, based on a discriminatory written examination, to make hiring decisions constitute[s] repeated violations of Title VII." Majority Opinion, Typescript at 16, footnote 23. I do not think that *Ricks* in any way overrules the 1980 decision of the Second Circuit in *Guardians Ass'n*.

In *Guardians Ass'n*, the plaintiffs were black and Hispanic members of the New York City Police Department who were laid off pursuant to a "last-hired, first-fired" policy. They brought suit in 1976 challenging seven entry level written examinations administered between 1968 and 1970 and having effect into 1974. "Central to the attack on the system of layoff by seniority was the contention that the department's entry level examinations were discriminatory, and that but for this discrimination plaintiffs would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired." 633 F.2d at 236 (footnote omitted). Since Title VII was not applicable to municipalities until 1972, the Second Circuit had to decide whether actions taken by New York City pre-1972 could form the basis of a Title VII lawsuit and whether EEOC charges filed in 1975 were timely.

The Second Circuit, per Judge Meskill, upheld the district court's affirmative answer to both questions. The circuit court's views were clearly elucidated in the following paragraph:

> Defendants argue that "the claims of discriminatory refusal to hire presented here clearly depend upon 'a past event which has no present legal significance.' "Reply brief at 5, quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Defendants wish, understandably, to accentuate their pre-Act conduct and trivialize their post-Act conduct, but logic and precedent preclude acceptance of defendants' assessment of the legal significance of their actions. We need not decide whether the giving of the tests and the compilation of the lists in themselves constituted the infliction of an actionable injury, for the results of the tests were in effect being "used to discriminate," in direct contravention of §703(h) of Title VII, each time a member of the plaintiff class was denied a chance to fill a vacancy. By utilizing the tainted test results for years after becoming sub-

> ject to the commands of Title VII, defendants continued a course of discriminatory conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner. Even if the unjustified refusals to hire did not comprise the core of defendants' discriminatory conduct, at the very least they represented the culmination of a continuously maintained illegal employment policy. *Acha v. Beame, supra,* 570 F.2d at 65. *And it is settled law that the limitation period determining the timeliness of a complaint filed as to such a policy is measured from the last occurrence of an instance of that policy. Id.*

633 F.2d at 249 (footnotes omitted) (emphasis added). Similarly, in the present case, the list was used to further an employment policy which the plaintiffs contend was based on a discriminatory examination. The manifestations of discrimination embodied in the test continue to occur over the entire life of the civil service list, *i.e.*, qualified minorities who were injured by the test were then precluded from being hired by the existence of a tainted list.

The majority observes that our case is distinguishable from *Guardians Ass'n*, by virtue of the fact that here the plaintiffs filed with the EEOC prior to Newark's first hiring from the list. Majority Opinion, Typescript at 18-19. Because there was no post-use filing, as in *Guardians Ass'n*, the majority implicitly argues that a premature filing does not satisfy the requirements of Title VII. I believe that under the reasoning of *Guardians's Ass'n* and the majority's own opinion, this conclusion is erroneous.

The *Guardians Ass'n* court by its own terms did not reach the issue of "whether the giving of the tests and the compilation of the lists in themselves constituted the infliction of an actionable injury. . . ." 633 F.2d at 249 (footnote omitted). The majority opinion today reaches that question when it decides ". . . the roster, because it arises from examinations which have discriminatory impact, could constitute an unlawful employment practice." Majority Opinion, Typescript at 18. If the plaintiffs could have filed within 180 days of the list's promulgation or within 180 days of its last use (Newark's first and only use of the roster was in 1977), then, in order for the word "continuing" to have any reasonable meaning, a filing between the first offense and the last offense would be timely as it came during the period of continuation. To hold otherwise would be to say that the violation runs for 180 days after the list is published and then it stops. After the next use the violation runs for another 180 days and then it also stops. In short, there would be no continuation at all. Rather, we would be saying nothing more than each discrete act of discrimination is followed by a 180 day limitation period. I think the more sensible approach is to say that the promulgation of a roster based on a discriminatory test gives rise to a cause of action under Title VII beginning at the list's publication and ending 180 days after its expiration. A filing at any time during this period would be timely irrespective of its relation to the test's use.[4]

Under the majority's view and that of the *Guardians Ass'n* court, if the list itself is not challenged within 180 days, the burden falls upon the victims of the discrimination to watch each municipality's hiring practices. Clearly, the municipality is in the best position to know when they will have a need to use the list, if at all. A plaintiff could avoid this disadvantage by filing at any period during the list's life. Furthermore, suppose a municipality employed a ten year civil service list based on a discriminatory examination. I cannot believe that Congress intended the very short limitation period in Title VII to be applied rigidly to cases where the employer could insulate the continuing discriminatory effect of its behavior for a period of years beyond the original discriminatory examination. The reality of the civil service list is that a victimized prospective employee cannot reapply for the position from which he or she has been unfairly kept. Finally, allowing a filing prior to the use of the list would obviate the necessity of plaintiffs, in cases such as the one before us, refiling with the EEOC when the defendants use the list as the defendants already have been fully apprised of the claims against them.

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[4] The use of the list would be relevant to the issue of damages only. Therefore, a charge filed prior to any use of the list would be timely but the plaintiffs would have no damages other than the list's dissolution until they were discriminatorily refused hire by the employer's use of the list in hiring a different person. This approach is consistent with the majority's starting of the clock at the promulgation of the list.

In summary, because I believe that *Ricks* and *Evans* have not disturbed the viability of the continuing violation theory and that a discriminatorily created roster constitutes a continuing violation over its entire life, I respectfully dissent from the majority's affirmance of the district court's conclusion that the Title VII charges were untimely filed.

III.

SECTION 1981: DISPROPORTIONATE IMPACT OR INTENT? (COUNT I)

I concur fully with the majority's conclusion that this case must be remanded as to the Newark defendants under either the disproportionate impact theory or the higher intent standard. I also agree that the plaintiffs have not alleged sufficient facts to make out a *prima facie* case of intentional discrimination against the state defendants. I do not agree that §1981 requires a showing of intent but I recognize, as does the majority, that this issue is controlled by our recent *en banc* decision in *Croker*.

The majority disposes of the §1981 issue by a single reference to the *Croker* holding. Majority Opinion, typescript at 23-24. They do not set forth any independent reasons for requiring intent in a §1981 case choosing instead to rely on the reasoning advanced by the *Croker* majority. I write only to supplement the very fine dissenting opinions of Judges Aldisert and Gibbons, both of which I joined in the *Croker* case.

The *Croker* majority begins its analysis by examining the language of §1981 and by comparing it to the language of the fourteenth amendment, interpreted by the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976) to require a showing of intent. Chief Judge Seitz concluded as follows:

> Section 1981 grants to all persons within the United States "the right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." The language of the statute is inconclusive, but we believe that if it points in any direction, it suggests a requirement for proof of purposeful discrimination. . . . The guarantee of the "same right" to make contracts "as is enjoyed by white citizens" is similar to the guarantee of "equal protection" embodied in the fourteenth amendment, a standard that requires proof of intentional discrimination under *Washington v. Davis*. As long as both nonwhite and white employees are subject to the same employment requirements or restrictions, both may be said to have been granted the right to contract on equal terms.

Croker, Slip Op. at 15 (citations and footnotes omitted). The court also compared §1981 to §703(a)(2) of Title VII which the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) held to require only a showing of impact.

Next, the *Croker* majority looked to the legislative history of §1981. The court recognized that §1981 was first enacted under the thirteenth amendment and then reenacted under the fourteenth amendment to obviate any concern for the constitutionality of the Civil Rights Act of 1866. *Croker*, Slip Op. at 17-18. After reviewing the legislative history the court acknowledged

> that the legislative history does not reveal a direct refusal to extend section 1981 to nonpurposeful conduct. Given the absence of a congressional declaration of intent to extend the 1866 Act to the effects of facially neutral conduct, however, we believe that it is more consistent with the language of and impetus behind the statute to conclude that the statute is directed only at purposeful conduct. We reach this conclusion fully aware that neither the language nor the legislative history provides certain guidance in interpreting section 1981.

Croker, Slip Op. at 20.

Finally, the *Croker* court discussed the policy considerations which led to its conclusion that proof of intent was a necessary element of a §1981 action. Basically the court feared that an impact standard could be overly intrusive in the private and public sector if it led to suits striking down " 'a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.' " *Croker*, Slip Op. at 20, *quoting Washington v. Davis*, 426 U.S. at 248. Further, because Congress created an elaborate administrative procedure for employment dispute resolution in Title VII, the majority assumed "that Congress [did not intend] section 1981 to cover the same conduct." *Croker*, Slip op. at 21.

I do not find any of the reasons stated by the *Croker* majority to be persuasive. At the outset, I recognize that virtually each circuit court which has considered this issue after *Washington v. Davis* has required a showing of intentional discrimination. On the other hand, the commentators have generally favored the lesser standard of disproportionate impact.[5] The *Croker* majority concluded that the legislative history of the Civil Rights Act of 1866 was "uncertain" as to whether the Act was intended to provide "protection from facially neutral actions having a discriminatory impact. . . ." *Croker*, Slip Op. at 18. Yet in the very same paragraph they concede that the Civil Rights Act was in fact used to strike down facially neutral statutes contained in the infamous "Black Codes." *Id.* at 19. As Judge Gibbons wrote powerfully in his *Croker* dissent:

> In this case we are not dealing with what the government would have to show in order to avoid a directed verdict under 18 U.S.C. §242, the criminal code descendant of the 1866 Act. The Act contemplated private civil as well as criminal enforcement. Issues such as the form of action for such private cases, and the quantity of proof sufficient to make out a *prima facie* case were not dealt with, for the good and sufficient reason that those questions were dealt with in the Process Act, the Judiciary Act, and the Common law. The 1866 Congress expected that in filling in the interstices in civil litigation, the courts would do so mindful of the social purpose of the legislation. The majority ignores that purpose. Free to chose a rule with respect to the contents of a *prima facie* case of a Section 1981 vio-

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[5] See, *e.g.*, *Developments in the Law — Section 1981*, 15 Harv. C.R.-C.L.L. Rev. 29 (1980); *Section 1981: Discriminatory Purpose or Disproportionate Impact?* 80 Colum. L. Rev. 137 (1980); *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?* 1977 Duke L.Jour. 1267. While on the district court, I reached the issue of the proper standard to be applied in a §1981 case holding that disproportionate impact satisfied the statute. Commonwealth of Pennsylvania v. Local Union 542, 469 F.Supp. 329, 400 (E.D.Pa. 1978).

> lation, it choses the one most likely to inhibit rather than advance that purpose.

Id. at 60-61 (footnotes omitted). When given an opportunity in *Washington v. Davis* to answer the question of which standard of proof to apply in a §1981 case, the Supreme Court chose to restrict its holding to the fourteenth amendment claim and therefore declined, in the words of Judge Gibbons, to adopt a policy that would "inhibit rather than advance" the social justice inherent in the 1866 statutory policies.

A number of the cases requiring a showing of intent have tracked the *Washington v. Davis* analysis, as did the *Croker* case, and concluded that §1981 claims should be held to the same standard as the fourteenth amendment. However, it is clear that:

> Section 1981 derives from the Civil Rights Act of 1866 and from the reenactment of section 1 of that Act in sections 16 and 18 of the Act of May 31, 1870. *Runyon v. McCrary, supra*, 427 U.S. at 168-70 n. 8, 96 S.Ct. 2586. Due to its unusual history, section 1981 can fairly be said to rest not only on the fourteenth amendment but also on the foundation provided by the thirteenth amendment. *Id.* at 189, 96 S.Ct. 2586 (Stevens, J., concurring). *See also Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 n. 11, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Strauder v. West Virginia*, 100 U.S. 303, 312, 25 L.Ed. 664 (1879); *Young v. Int'l Tel. & Tel. Co.*, 438 F.2d 757, 759 (3d Cir. 1971). As we have previously noted, *the legislative history of the Civil Rights Act of 1866 manifests Congress' purpose to enact sweeping legislation implementing the thirteenth amendment to abolish all the remaining badges and vestiges of the slavery system.*

Mahone v. Waddle, 564 F.2d 1018, 1030 (3d Cir.1977), *cert. denied*, 438 U.S. 904 (1978) (footnote omitted) (emphasis added) (applying §1981 to allegations of police brutality against minority plaintiffs; no issue of intent presented).

I believe that the thirteenth amendment genesis of §1981 makes the fourteenth amendment reasoning of *Washington v. Davis* inapplicable. Rather than strain to place §1981 into the same analytical category as the fourteenth amendment, I would instead rely on the plain and broad remedial language of §1981 and the purposes of the thirteenth amendment. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute grants affirmative rights to "all persons within the jurisdiction of the United States. . . ." The fourteenth amendment, on the other hand, is phrased in terms of a negative injunction, *i.e.*, "no state shall make or enforce any law. . . ." Section 1981 is directed to the recipient of the rights and does not indicate any concern for the subjective mentality of those who would deprive a citizen of his or her rights.

Moreover, the thirteenth amendment has been held to be a remedial amendment with powers broader than the ending of slavery. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968), Justice Stewart quoting from the *Civil Rights Cases* of 1883 wrote:

> Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to

> the acquisition of real and personal property? We think the answer to that question is plainly yes.
>
> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." Civil Rights Cases, 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that — a question not involved in this case — it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*." Ibid. (Emphasis added.)
>
> Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master. Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress — who were, after all, the authors of the Thirteenth Amendment — had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act.

392 U.S. at 439-40 (footnotes omitted).

Jones is frequently cited for the proposition that the Supreme Court will require intent in §1981 cases because it has done so for cases arising under §1982. The language of *Jones* that §1982 "was meant to prohibit *all* racially motivated deprivations of the rights . . ." is relied upon in deriving this conclusion. However, I am not convinced that this over-quoted language is at all conclusive on the issue of intent in a §1981 case. In the first place, the Court was presented with a set of facts that left no question of intent. The plaintiff was refused an opportunity to purchase a home solely on the basis of his race. The Court was not presented with a factual situation whereby a facially neutral housing policy resulted in *de facto* discrimination. Secondly, the Court's emphasis on the word "all" indicates that it was addressing the distinction between state and private party discrimination. There is no indication in *Jones* that the Court meant to exclude suits under §1982 where only disproportionate impact could be shown. Indeed in a later passage, where the Court sums up a discussion of the sweeping effect of the Civil Rights Act of 1866, the reference to motivation is completely deleted:

> In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: t*o prohibit all racial discrimination*, whether or not under color of law, with respect to the rights enumerated therein — including the right to purchase or lease property.

392 U.S. at 436 (emphasis added). I believe that it is a more persuasive indication of the Supreme Court's reasoning that the word motivated appears in connection with a discussion of the petitioners' argument (where intent is clearly established and not at issue) but deleted where the court addresses the 1866 Act at large.

The "badges and incidents of slavery" as well as the rights of all citizens, white and black alike, created by §1981 are objective. The §1981 rights do not derive their life from the nefarious intent of those who would deprive citizens of their thirteenth amendment and statutory entitlements, *i.e.*, to be free from the incidents of slavery and to participate fully and freely in American society. I cannot believe that Congress would use such broad language as it did in §1981, creating new rights for minority citizens, only to have the vindication of those rights denied by benign neglect or institutional forms of racism.

However persuasive *Washington v. Davis* may be in its analysis of the fourteenth amendment, its precedential value and usefulness in interpreting §1981 is limited. It is noteworthy that the case itself recognized that the commands of employment discrimination *statutes* are not in any sense necessarily co-extensive with constitutional commands:

> [E]xtension of the rule [of disparate impact] beyond those areas *where it is already applicable by reason of statute*, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248 (emphasis added). Even more convincing that the Supreme Court views the dictates of the fourteenth amendment differently from those of "legislative prescription" in the area of civil rights, is the recent case of *Parratt v. Taylor*, 49 U.S.L.W. 4509 (1981). There, at least five members of the Court adopted the view that,

> Nothing in the language of [42 U.S.C.] §1983 or its legislative history limits the statute to intentional deprivations of constitutional rights. In *Baker v. McCollan*, [443 U.S. 137 (1979)], we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under §1983.

49 U.S.L.W. at 4510.

Interpreting the language of the Constitution, the Court held in *Washington v. Davis* that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct [intentionally] discriminating on the basis of race." 426 U.S. at 239. Yet *Parratt v. Taylor*, which construed the language of §1983 — "every person who . . . subjects or causes to be subjected . . . any citizen . . . to the deprivation of any rights . . ." — held that §1983, which was indisputably enacted under the fourteenth amendment's grant of legislative authority, does not require proof of intentional deprivations.

In my view *Washington v. Davis* is totally inapplicable in the §1981 context. The thirteenth amendment's concern for the elimination of the badges and incidents of slavery is an objective impact standard completely apart from the subjective intent based considerations of the fourteenth amendment. Even assuming that §1981's repassage under the fourteenth amendment in 1870 makes a fourteenth amendment analysis relevant, the *Washington v. Davis* and *Parratt v. Taylor* decisions make clear that the constitutional analysis is not to be rigidly carried over into the area of civil rights statutes.

Likewise, I am not convinced that, because the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), decided impact suffices in the Title VII context, it is inconsistent to have two remedial statutes operating in the same area with the same standard of proof. In fact, Judge Aldisert's dissenting argument in *Croker* assumed "that in enacting Title VII Congress also recognized the circumstances where the two remedies are congruent." Slip Op. at 48. Judge Aldisert reasoned wisely that,

> there will be more predictability and reckonability to the law of employment discrimination, more understanding and societal acceptability by the lay public, including putative employees, employees, and employers alike, if there is consistency in the judicial interpretation of the two statutes. The interested lay public will not be able to understand that where a claim of discrimination antedates the limitation period of Title VII the employee must prove discriminatory intent for years one and two, but need only prove discriminatory impact for years three and four.

Croker, Slip Op. at 49. Since the reach of §1981 is greater than that of Title VII, to sweep away the broad remedial powers of §1981 by requiring intent in areas not covered by Title VII[6] or, in employment cases, where discrimination is insulated from a Title VII challenge by a six month statute of limitations, is an injustice too great for our court to attribute to the unarticulated intent of Congress. *Croker*, Slip Op. at 21.

Finally, relying on policy considerations to support its conclusion, the *Croker* majority wrote:

> In rejecting a discriminatory impact standard for fourteenth amendment claims, the Supreme Court noted that such a standard might "invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U.S. at 248. Applying an impact standard to section 1981 raises similar concerns. In significant measure, an impact standard would have the very consequences that the Supreme Court sought to avoid in *Washington v. Davis*. In fact, because section 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to section 1981 could be more instrusive than would one applied to the fourteenth amendment. *See Heiser, supra*, at 245-46. We do not address whether Congress could pass legislation under the thirteenth amendment requiring proof of impact only. Without, however, a clear indication that Congress intended section 1981 to reach nonpurposeful conduct or neutral regulations having a disproportionate impact, we are reluctant to ignore the concerns voiced in *Washington v. Davis*.

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[6] Title VII is limited to the employment context, whereas §1981 applies to virtually every area of right and responsibility. Also, Title VII includes within it a six-month statute of limitations. 42 U.S.C. §2000e-5(e). Section 1981 takes its statute of limitations from the nearest equivalent state statute. In *Croker*, the Pennsylvania statute was six years as it is for New Jersey in the present case.

Slip Op. at 20-21. The fear that a civil rights statute will be used to strike down "a whole range of tax, welfare, public service, regulatory and licensing statutes," which impact unequally on the poor and on minorities does not concern me. First, if the plaintiffs can prove disproportionate impact and the public service statute is without a rational basis then why should it not fall? Second, the Supreme Court and courts of appeals have had much experience in deciding where to draw lines on a case-by-case basis. The *Croker* court has abandoned this time honored judicial role by giving way to a hollow fear that §1981 "could be more intrusive: therefore it should be limited to intentional discrimination." Refusing to adopt a standard designed to completely root out inequality because to do so would be intrusive is like a dentist drilling out half of the decay in a rotted tooth and leaving the rest so as not to be intrusive.

In my view all of the public policy considerations weigh heavily in favor of an impact standard. As Judge Aldisert observed the public will be confused by two separate standards of proof in the same case. The difficulty of proving intent will leave many victims of discrimination frustrated when the clear purpose of §1981 is to foster equality among the races. Finally, our law will be left with the striking anomaly that corporations and private parties can be held liable without regard to mental state in a number of civil and criminal contexts but not in the vital area of equal access to jobs. Simply stated, the cost of allowing inequality to go unremedied is far in excess of the benefit derived from allowing even well-intentioned employers an escape from their duty to eradicate institutional bias.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[Corrected Copy]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2392

HOWARD, FRANK, JR., RUBIN J. BATTLE,
FLOYD BOSTIC, JR., LYNETTE CRAWFORD,
CHARLES E. HARRIS, and OLIVIA C. HOWARD,
and others similarly situated

v.

NEW JERSEY DEPARTMENT OF CIVIL SERVICE,
NEW JERSEY CIVIL SERVICE COMMISSION,
S. HOWARD WOODSON, JR. in his official
capacity as President of the New Jersey
Civil Service Commission,
HOWARD F. HANEMAN, in his official capacity
as a Commissioner of the New Jersey
Civil Service Commission,
HENRY R. LEINER, in his official capacity
as a Commissioner of the New Jersey
Civil Service Commission,
LEONARD SIMMONS, in his official capacity
as a Commissioner of the New Jersey
Civil Service Commission,
RALPH P. SHAW, in his official capacity
as Chief Examiner and Secretary of the
New Jersey Department of Civil Service,
CITY OF NEWARK, HUBERT WILLIAMS, in his
official capacity as Director of
the Newark Police Dept.,
OLIVIA HOWARD and LYNETTE CRAWFORD,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D. C. Civil No. 77-1471)

Argued July 10, 1980

Before WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Opinion filed December 4, 1981)

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OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

Plaintiffs Olivia Howard and Lynette Crawford claimed, in a district court civil action filed in July 1977, that the hiring practices of the Newark police department discriminated on the basis of sex. They sought re-

lief under two statutes, 42 U.S.C. §2000e *et seq.* ("Title VII") and 42 U.S.C. §1983 ("§1983"). The district court denied their Title VII claim because plaintiffs had failed to file timely charges with the Equal Employment Opportunity Commission ("EEOC"). The §1983 claim was dismissed for plaintiffs' lack of standing. We affirm the district court's conclusions on both the Title VII and §1983 claims.

FACTS

Plaintiffs Olivia Howard and Lynette Crawford applied for positions as police officers with the Newark police department. The application procedure involved is fully described in the opinion of *Bronze Shields, Inc. v. New Jersey Civil Service,* F.2d (3d Cir. Nos. 80-2003 & 81-1133, filed December 1, 1981), and hence only a brief description will be given here. The initial step for all applicants is taking a written civil service examination. In January 1975, plaintiffs took the examination and failed. Because they failed, they were not permitted to take the physical agility or medical examination, the next step in the application process. Neither plaintiff was placed on the roster of those eligible to be hired as Newark police officers and neither has been hired.

Defendants in this case are the same as those in *Bronze Shields, supra.* Defendant New Jersey Civil Service Commission is responsible for administering the written, physical, and medical examinations given applicants for police officers throughout the State of New Jersey. Defendant City of Newark uses the results of these state examinations as a basis for hiring officers for Newark's police department.

In July 1976, plaintiffs and four black males filed employment discrimination charges against defendants with the EEOC. These six individuals alleged that defendants discriminated against black and Hispanic men and women on the basis of race and sex in hiring and promoting police officers in the Newark police department. After receiving right-to-sue letters from the EEOC, these six individuals jointly filed the complaint which is the subject matter of this appeal in the United States District Court for the District of New Jersey. This complaint alleged employment discrimination by defendants on the basis of both race and sex. At the same time, the six plaintiffs moved to amend the complaint in *Bronze Shields, supra*. The *Bronze Shields* case involved allegations of racial discrimination in the hiring and promotion of officers in the Newark police department. When the *Bronze Shields* complaint was filed, it did not state a cause of action grounded on Title VII but did state one grounded on §1983. The district judge permitted plaintiffs to add their charges of racial discrimination to the *Bronze Shields* complaint but not their charge of sex discrimination. The parties then stipulated to the dismissal of the race discrimination charges from this case. The remaining two female plaintiffs were left only with their claims of sex discrimination, one based on Title VII, the other on §1983. Plaintiffs appeal from the district court's dismissal of these claims.

Plaintiffs' contentions on appeal regarding the Title VII claim have been addressed at length in *Bronze Shields, supra*. For the reasons set out in that opinion, the district court's dismissal of the Title VII claim is affirmed. The only issue which must be addressed here is whether the district court properly dismissed the §1983 cause of action for plaintiffs' lack of standing.

STANDING TO SUE UNDER SECTION 1983

The facts relevant to the standing issue are not complicated. Plaintiffs took and failed the initial written civil service examination required of all police officer candidates. Because they failed, plaintiffs were not permitted to take the physical agility test administered in phase two of the application process and were not placed on the eligibility roster. Plaintiffs contend that the physical agility test, but not the written examination, discriminates on the basis of sex and therefore violates §1983.

The Supreme Court has summarized the standing requirement in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978):

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury,' to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). See also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)."

To have standing, then, plaintiffs must demonstrate: (1) they suffered an injury; and (2) defendants' allegedly unlawful conduct caused their injuries.

(1) *Injury*

Plaintiffs suffered a distinct and palpable injury when defendants deprived them of employment. Defendants did not place plaintiffs on the eligibility roster. As a result, plaintiffs could not be considered for employment by the Newark police department for the next three years. Loss of a job opportunity is unquestionably a distinct and palpable injury. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Bronze Shields, Inc., supra; Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168 (3d Cir. 1978). Plaintiffs, therefore, satisfy the first prong of the test for standing.

(2) *Causal Connection Between Challenged Conduct and Injury*

Plaintiffs do not satisfy the second prong of the standing test: there is no causal connection between the claimed injury (loss of job opportunity) and the challenged conduct (use of the physical agility test). Plaintiffs were refused employment because they failed the initial written examination, not because they failed the physical agility test. The required causal connection will be satisfied only if there is a substantial likelihood that the relief requested will redress the injury. *Duke Power, supra* at 74; *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 262 (1977); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). In the present case, plaintiffs requested the court to declare the physical agility test discriminatory and invalid. Such a declaration would render prior test results invalid and permit those women who failed the physical agility test to continue with the application process and perhaps be hired. Assuming the relief requested is granted, plaintiffs' injury will not be remedied. Plaintiffs will still not qualify for employment because they failed the written examination. Defendants' use of the challenged physical agility test did not cause plaintiffs' loss of job opportunity. Thus, plaintiffs do not have standing to challenge defendants' use of the physical agility test.

The failure of a plaintiff to satisfy the causal connection requirement of standing has resulted in dismissal in other cases. In *Rothblum v. Board of Trustees of College of M.&D.*, 474 F.2d 891 (3d Cir. 1973), plaintiffs had applied for admission to medical school and been rejected.

Plaintiffs claimed defendant unlawfully discriminated against them because they were non-residents of New Jersey. Defendant demonstrated that, although it indeed discriminated against non-resident applicants, plaintiffs had been denied admission because their grades were too low. The court held plaintiffs were without standing because the purportedly discriminatory admission "policy played no part in the rejection of their application for admission." *Id.* at 898. *See also Doherty v. Rutgers School of Law — Newark,* F.2d (3d Cir. Nos. 80-1786/1787, filed June 16, 1981) (plaintiff, a rejected law school applicant who claimed school's Minority Student Admissions Program discriminated against him, held to have no standing because his rejection resulted from his academic deficiencies, not because he failed to qualify, or was otherwise disadvantaged, by the minority program); *Coopersmith v. Roudebush,* 517 F.2d 818, 823 (D.C.Cir. 1975) (plaintiff, who claimed employer's hiring policy requiring recent work experience discriminated against women who abandoned employment to raise children, held to be without standing because she had worked recently and was denied the job for other reasons).

In an analagous case, *East Texas Motor Freight v. Rodriquez,* 431 U.S. 395 (1977), several blacks and Mexican-Americans claimed their employer's no transfer policy and seniority system discriminatorily denied them the desirable job of line-driver. The plaintiffs, however, did not meet other, admittedly non-discriminatory, requirements for the line-driver job. (They had insufficient driving experience and too many prior accidents.) "Thus, they could have suffered no injury as a result of the allegedly discriminatory practices . . . ." *Id.* at 403-04. The cited cases support our conclusion that plaintiffs are without standing because they challenge conduct which did not harm them.

Plaintiffs attempt to circumvent the causation requirement by arguing they are threatened with a future harm. Threatened future harm can provide the basis for standing. *Duke Power, supra* (plaintiffs, alleging the harmful effects of nuclear power plants, had standing to challenge the construction of a nuclear power plant even though it was only under construction); *Steffel v. Thompson*, 415 U.S. 452 (1974) (plaintiff can seek to enjoin the enforcement of a state criminal statute if genuinely threatened with prosecution). Plaintiffs argue that, if the written examination they failed is invalidated in the *Bronze Shields* litigation, they will be threatened with having to take the physical agility test. Plaintiffs' argument no longer has force because the written examination was not invalidated in *Bronze Shields*. Furthermore, even had the written examination been invalidated, plaintiffs are unable to demonstrate that they would pass a valid, non-discriminatory written examination so as to be in a position to take the physical agility test or that they would fail the physical agility test. Plaintiffs have not suffered a sufficient threatened harm to meet the standing requirement as explained in *Duke Power*.

Plaintiffs contend that they have suffered a second type of threatened harm which gives them standing to challenge the physical agility test. Threatened injury can constitute injury-in-fact where the threat is so great that it discourages the threatened party from even attempting to exercise his or her rights. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977), the Court said:

> "If any employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more

> subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."

In the present case, however, the alleged threat of discrimination posed by the physical agility test did not discourage plaintiffs from applying for the job. Plaintiffs did apply, failed the initial written examination, and were denied employment. Thus, plaintiffs cannot rely on this "threat" to satisfy the standing requirement.

We conclude that plaintiffs have suffered no injury caused by the conduct they challenged as discriminatory. Plaintiffs are therefore without standing to challenge defendants' use of the physical agility test under §1983.

CONCLUSION

The district court's dismissal of both the Title VII and §1983 claims of sex discrimination was proper and will be affirmed.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

This Title VII and 42 U.S.C. §1983 case presents a challenge to the hiring practices of the Newark police department which is related to the issues we faced in the companion case of *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, No. 80-2003 (3d Cir. 1981). In the present action, plaintiffs Olivia Howard and Lynette Crawford claim that the Police Officer Physical Performance Test (POPPT) administered to candidates who successfully pass the written civil service examination discriminates against female candidates. Neither Howard nor Crawford passed the written examinations and, therefore, they were not permitted to take the physical agility test. Because I disagree with the majority's conclusion in *Bronze Shields*, I dissent from their holding that the plaintiffs are without standing to challenge the physical agility test.

I.

Olivia Howard and Lynette Crawford are black female applicants for the entry level position of police officer in Newark. In July 1976, the plaintiffs filed charges with the Equal Employment Opportunity Commission (EEOC) alleging both race and sex discrimination. When they filed charges with the EEOC, Howard and Crawford were plaintiffs in *Bronze Shields* and agreed by stipulation to have their race claims considered exclusively in the context of the *Bronze Shields* litigation. Thus, this action is limited to a claim of sexual bias with respect to the physical performance portion of the hiring process. Plaintiffs do not contend that the written examination was in any way tainted by sexual bias.

In its Stipulated Order of Dismissal in Part, the district court permitted the race claims and the plaintiffs' class certification issue to be considered in the context of the *Bronze Shields* litigation. On February 23, 1979, the district court refused to certify a class in *Bronze Shields* on the ground that the plaintiffs, including Howard and

Crawford, did not have valid Title VII claims because their EEOC charges were not filed on time. In an August 22, 1979 Order in the present case, the district court dismissed the plaintiffs' suit because "plaintiffs' Title VII claims are barred by plaintiffs' failure to file timely E.E.O.C. charges. . . . There is no evidence of intentional discrimination against women with respect to the written open competitive examination . . . [and] since plaintiffs [have] failed to pass the written examination, and therefore [are not] eligible to take and [have] not taken the physical performance test, they lack standing to challenge the physical performance test . . . ." App. at A129.

II.

The lower court's decision on standing is correct as to the Title VII claims only if the EEOC charges were in fact filed out of time. I have dissented to the majority's decision in *Bronze Shields* affirming the district court's opinion as to the untimeliness of the Title VII filing. Because I believe that the EEOC charges were timely filed in *Bronze Shields*, I have concluded that Howard and Crawford were improperly denied class representative status and that they do have standing to challenge the physical performance test. Furthermore, since they have alleged that the POPPT was intended to discriminate against women, I have concluded that class certification was improperly denied under §1983.

The standing requirement under article III of the United States Constitution is satisfied when plaintiffs have alleged a personal stake in the outcome of the controversy, injury in fact, and a causal connection between the actions of the defendants and the injury of the plaintiffs. *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978); *Baker v. Carr*, 369 U.S. 186, 204 (1962). There is little question that the *Howard* plaintiffs have a personal stake in the controversy and would present the court with "concrete adverseness." 369 U.S.

at 204. Likewise, there is no disagreement over whether the plaintiffs have suffered an injury in fact. The majority finds that the plaintiffs "suffered a distinct and palpable injury when defendants deprived them of employment." Majority Opinion, Typescript at 5. Yet, the majority concludes that the plaintiffs lack standing to remedy their injury "because they failed the initial written examination, not because they failed the physical agility test." *Id.*

I write only to note that it is the majority's opinion in *Bronze Shields* which deprives the plaintiffs of Title VII standing in this case. If the EEOC filings had been held to be timely, then Newark could not shield from scrutiny an allegedly discriminatory second step in the hiring process by an initial act of discrimination. As to the §1983 claim, the plaintiffs do have standing to represent the class of women applicants who have passed the written exam but failed the POPPT even though they have not passed the first hurdle themselves. *Falcon v. General Telephone Co.*, 626 F.2d 369 (5th Cir. 1980). I therefore dissent from the majority's affirmance of the district court's refusal to certify a class under §1983 consisting of all women who passed the written exam but failed the POPPT.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts. The Legal Intelligencer. Phila., Pa.) ®-55

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 2022-72

BRONZE SHIELDS, INC., et al., :
:
Plaintiffs, :
:
v. :
:
NEW JERSEY DEPARTMENT OF :
CIVIL SERVICE, et al., :
:
Defendants. :

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 950-73

VULCAN PIONEERS, INC., et al., :
:
Plaintiffs, :
:
v. :
:
NEW JERSEY DEPARTMENT OF :
CIVIL SERVICE, et al., :
:
Defendants. :

OPINION

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MEANOR, District Judge.

This opinion deals with two actions presently before this court, Vulcan Pioneers, Inc., et al. v. New Jersey Department of Civil Service, et al., No. 950-73 (D.N.J. complaint filed June 29, 1973 ("Vulcan Pioneers")[1] and Bronze Shields, Inc. et al.

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[1] In 1977, suit was brought by the Justice Department to enforce the provisions of §707 of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*) as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972), the non-discrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. §1242), and for the

v. New Jersey Department of Civil Service., et al., No. 2022-72 (D.N.J. complaint filed

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purpose of protecting and enforcing rights guaranteed by the fourteeneth amendment. The Justice Department alleged that the State of New Jersey, the State Civil Service Examiner and 12 New Jersey municipalities were engaged in a pattern and practice of unlawful employment discrimination against black and Hispanic persons with respect to hiring and promotion in the fire departments of the defendant municipalities. United States v. State of New Jersey, et al., No. 77-2054 (D.N.J. complaint filed Oct. 4, 1977). Subsequently, this action was consolidated with Vulcan Pioneers on Feb. 15, 1978.

On June 22, 1978, this court entered an order dismissing the United States' complaint with respect to those allegations based on Title VII of the Civil Rights Act of 1964, as amended. The court held the Attorney General lacked authority to bring suit under said statute absent a referral from the Equal Employment Opportunity Commission ("EEOC"). Plaintiff's motion for reconsideration of such order was denied on Oct. 4, 1978.

However, pursuant to §5 of Reorganization Plan Number 1 of 1978, 43 Fed. Reg. 19807 (1978), which gave the Attorney General authority to initiate suits independently under Title VII effective July 1, 1978, the Justice Department refiled its complaint with respect to the Title VII allegation. United States v. State of

Dec. 29, 1972) ("Bronze Shields"). In Vulcan Pioneers, defendants move for dismissal of Count II of the complaint, which alleges violation of Title VII, on the ground that the charge was not filed in a timely manner. Plaintiffs, on the other hand, move to certify a plaintiff class for Count II. In Bronze Shields, plaintiffs move to certify a plaintiff class for Count II, which likewise alleges employment discrimination in violation of Title VII.

Footnote continued

New Jersey, et al., No. 79-184 (D.N.J. complaint filed Jan. 15, 1979).

Congress granted the President the power to make major coordination and functional changes among the federal agencies pursuant to the Reorganization Act of 1977 (5 U.S.C. § 901 et seq.). Once a reorganization plan, such as the one mentioned above, is submitted, Congress has 60 days thereafter to formally disapprove. 5 U.S.C. §906. With respect to the Attorney General's power to independently initiate public sector litigation, the House resolution to disapprove said plan was rejected at a hearing. H.R. Res. 1049, 95th Cong., 2d Sess., 124 Cong. Rec. 3201-07 (1978). The Senate resolution was postponed indefin-

The Vulcan Pioneers matter was originally filed against the New Jersey Department of Civil Service, its Chief Examiner, the New Jersey Civil Service Commission, the President and three Commissioners of the Commission, and the City of Newark Fire Department. The complaint alleged that the named defendants engaged in acts and practices that racially discriminate against blacks and Hispanics in their employment in violation of 42 U.S.C. §1981, 42 U.S.C. §1983, and the thirteenth and fourteenth amendments.[2]

Footnote continued

itely. S. Res. 404, 95th Cong., 2d Sess., 124 Cong. Rec. 7124 (1978). Section 5 of the Reorganization Plan went into effect July 1, 1978 pursuant to a Presidential Executive Order, see Exec. Order No. 12068, 43 Fed. Reg. 28971 (1978), thereby permitting the Justice Department to file its Title VII complaint as of that date.

2/ The §1981, §1983, and constitutional claims were subsequently dismissed by this court as against the New Jersey Department of Civil Service and the New Jersey Civil Service Commission on Oct. 16, 1978, in both the Vulcan Pioneers and Bronze Shields matters.

On July 27, 1976, Mr. Ronald Heath, a Newark firefighter, filed charges with the EEOC against the named defendants. He stated in his charge that such entities "have administered hiring and promotional examinations for firefighter positions which discriminate against Blacks and Hispanics." A right to sue letter was issued on April 20, 1977. Thereafter, plaintiff's complaint was amended, on January 6, 1978, to include a second count (nunc pro tunc July 1, 1977) alleging a violation of Title VII of the 1964 Civil Rights Act, as amended. 42 U.S.C. §2000e et seq.

The Bronze Shields case was brought on December 29, 1972, pursuant to 42 U.S.C. §1981, 42 U.S.C. §1983, and the thirteenth and fourteenth amendments because of alleged discriminatory hiring and promotion policies against blacks and Hispanics in the Newark Police Department.[3] The plaintiffs are 10 individuals and a policemen's organization open to all members of the Newark Police Department. Seven individuals were unsuccessful applicants for positions in the Department; two of these did not meet minimum standards administered by the State, and five, although qualified under State standards, did not meet further standards administered by Newark. The remaining three individuals are patrolmen who have been denied or are otherwise ineligible

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[3] This court, by opinion dated April 2,

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1976, declined to grant plaintiffs' motion to certify a general class consisting of "... all Black and Hispanic people who have sought, now seek or will seek to serve as members of the several ranks of the Newark Police Department and who have been, are, or may be discriminated against on the basis of race or ethnic origin." Instead, this court certified three subclasses on the ground that such division would serve to protect the interests of some members of a class which might in some particulars be adverse to those of others. See Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir.), cert. denied, 400 U.S. 951 (1970).

for promotion. The named defendants are the New Jersey Department of Civil Service; its Chief Examiner; the New Jersey Civil Service Commission; the President and three Commissioners thereof; the City of Newark, and the director of the Newark Police Department. In July 1976, several black applicants and several current black employees of the Newark Police Department filed charges of employment discrimination with the EEOC. Right to sue letters were issued, and this court, on November 3, 1977, granted plaintiffs leave to amend the complaint by adding Count II, (nunc pro tunc July 1, 1977), alleging employment discrimination in violation of Title VII of the 1964 Civil Rights Act, as amended. 42 U.S.C. §2000 et seq.

The jurisidction of this court is invoked pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343 and venue is proper in this court under 28 U.S.C. §1391(b).

I. THE STATE DEFENDANTS' MOTION IN VULCAN PIONEERS TO DISMISS COUNT II OF THE COMPLAINT IS GRANTED.

Defendants, New Jersey Department of Civil Service and Civil Service Commission, move to dismiss plaintiffs' Title VII count on the ground that it was not filed timely. Plaintiff Heath commenced employment with the City of Newark as a firefighter on April 22, 1963 on the basis of his passing an entry level Civil Service examination in 1961. (Heath Deposition, p. 6.) Thereafter, in 1968, 1972, and 1976, Heath competed in promotional tests for a captain position but failed. (Heath Deposition, p. 16.) On July 27, 1976 (prior to the 1976 Civil Service examination), he filed his EEO charge against defendants. (Heath Deposition, p. 65.) Said charge, which alleged discriminatory hiring and promotional policies against blacks and Hispanics in the Newark Fire Department, thereafter became the basis of his charge.

Plaintiffs respond that defendants' discrimination in hiring and in promotion did not end upon promulgation of the respective examinations in 1973.[4] The eligibility lists set forth and maintained thereafter constituted a "continuing violation" of Title VII up to the time the EEOC charge was filed in 1976. Such doctrine has been recognized and accepted by the Third Circuit. For example, in Wetzel v. Liberty Mutual Inc. Co.,

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4/ The last "entry-level" test held before July 27, 1978 took place on May 30, 1973. The list of eligibles was promulgated on Oct. 4, 1973 and the last appointment made therefrom was on Dec. 2, 1974. Plaintiffs, however, point out that on March 10, 1976 the Newark Fire Department hired 18 firefighters with the use of CETA funds. On Sept. 6, 1976, 17 additional firefighters were hired. See Newark's answers to interrogatories; Caufield Deposition, pp. 100-101.

508 F.2d 239 (3d Cir. 1975), the Court stated: "Wetzel's and Ross' charges alleged the maintenance of discriminatory hiring and promotion policies up to the time of the filing of their complaint. Such policies are continuing violations of Title VII and would allow a filing of a charge at any time by a present employee." 508 F.2d at 246. (Emphasis supplied).

In addition, the date of the last hire made from the list is irrelevant for the purposes of deciding when the Civil Service's "continuing violation" ended. As long as the list remained in effect, the Civil Service precluded any permanent hiring not done in accordance with it. In Davis v. County of L.A., 566 F.2d 1334 (9th Cir. 1977), cert. granted, 57 L.Ed.2d 1132 (1978) the Ninth Circuit stated: "Of course, this continued threat to use the 1972 test as part of the selection process right up to the filing of the complaint in this case is admittedly a violation of Title VII." 566 F.2d at 1341, n. 14.

And finally, plaintiffs assert that defendants' failure to promote Mr. Heath constituted a continuing act of discrimination since he continued his interest in promotion. For the foregoing reasons, plaintiffs conclude that the Civil Service motion to dismiss should be denied.

It is fundamental that a Title VII suit may not be brought unless there is strict compliance with all the necessary procedural requirements for such actions. _See_ _McDonnell Douglas v. Green_, 411 U.S. 792, 798 (1973). Such timely filing is jurisdictional and a necessary prerequisite to the maintenance of a Title VII action. _United Airlines v. Evans_, 431 U.S. 553, 555, n.4 (1977). As emphasized in _Alexander v. Gardner-Denver Co._, 415 U.S. 36 (1974), Title VII "specifies with _precision_ the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." 415 U.S. at 47. (Emphasis supplied.) See Electrical Workers v. Robbins & Meyers, 429 U.S. 229, 239-240 (1976).[5]

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[5] The Court of Appeals for the District of Columbia has held, however, that the time restriction on filing charges with the EEOC is not jurisdictional, but subject to extension in "deserving cases." Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 474-475 (D.C. Cir. 1976); Shehadeh v. Chesapeake and Potomac Tel. Co. of Md., No. 76-1790 (D.C. Cir. 1978); see also Reeb v. Economic Opportunity, Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); cf. East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975) (limiting Reeb to its facts).

Such reasoning is questionable in view of the Supreme Court's language in Gardner-Denver, supra, 415 U.S. at 47, and in United Airlines v. Evans, 431 U.S. 553, 555, n.4 (1977). In Evans, the Court stated "a discriminatory act which is not made the basis for a timely charge ... is merely an unfortunate event in history which has no present legal consequences." Id. at 558.

In addition, the legislative history suggests Congress intended to treat the time provisions as statutes of limitations.

Pursuant to 42 U.S.C. §2000e-5(e), it is required that a charge of discrimination must be timely filed with the EEOC within 180 days after the alleged unlawful employment practice occurred or within 300 days if proceedings were

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Senator Case, a floor manager in the Senate of the House bill, H.R. 7152, stated that the six month limit on filing with the EEOC was "toward the pressing of 'stale' claims." 110 Cong. Rec. 7243 (1964). Senator Humphrey, commenting on the differences between H.R. 7152 and the substitute Senate bill, S. 656, eventually passed by the Senate, referred to its 90 days time period as a "period of limitations. Id. at 12723. Where a limitations period can be asserted as a defense, as in a medical malpractice action, see, e.g., N.J.S.A. 2A:14-2, it can be waived and, therefore, is not jurisdictional. However, where a limitations period is a condition precedent to the institution of a valid suit, such as Title VII, 42 U.S.C. §2000e-5(e), or an HEW review action, for example, 42 U S.C. §405(g), it can then properly be deemed jurisdictional. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246, n.8 (3d Cir. 1975); Weise v. Syracuse Univ., 522 F.2d 397, 412 (2d Cir. 1975); Smith v. Office of Econ. Oppor. for St. of Ark., 538 F.2d 226, 228 (8th Cir. 1976); Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1198-1204 (1971).

initially instituted with a state agency.[6] This Title VII statute of limitations bars consideration by a court of discriminatory acts not made the basis of a timely charge. United Airlines v. Evans, supra, 431 U.S.

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[6] Title VII, §706(e), 42 U.S.C. §2000e-5(e) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

at 558; Moore v. Sunbeam Corp., 459 F.2d 811, 821 (7th Cir. 1972); Plummer v. Chicago Journeymen Plumbers, etc., 452 F. Supp. 1127 (N.D. Ill. 1978). It is apparent, as defendants point out, that Mr. Heath did not file his EEOC complaint within 180 days of the last appointment made from the "promotion" list.[7] Therefore, since his claim was untimely, the issue becomes whether there has been a "continuing violation of Title VII.

As a general rule, a Title VII claim may be premised only upon specific instances of misconduct of which the EEOC is apprised within the statutorily prescribed time. United Airlines v. Evans, supra, 431 U.S. at 554-559. When, however, a continuing discriminatory employment practice is alleged, the administrative complaint may be timely filed notwithstanding that the conduct impugned is comprised in part of

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7/ The 180-day limit is applicable since Mr. Heath did not initially institute proceedings with a state agency.

acts lying outside the charge-filing period. See Wetzel, supra, 508 F.2d at 246; Macklin v .Spector Freight Sys., Inc., 478 F.2d 979, 987-988 (D.C. Cir. 1973). As Congress itself has said, for these "violations [that] are continuing in nature" it is appropriate to "measur[e] the running of the required time period from the last occurrence of the discrimination and not from the first occurrence."[8] Challenges to assertedly unlawful hiring, Wetzel v. Liberty Mut. Ins. Co., supra, and promotion, Guilday v. Dept. of Justice, 451 F. Supp. 717 (D. Del. 1977),[9] policies

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8/ 118 Cong. Rec. 7169 (1972)(conference report).

9/ See also Clark v. Olinkraft, Inc., 556 F.2d 1219, 1222 (5th Cir. 1977); Rick v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975); cf. Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975). In Olson, Chief Judge Gibson stated that to construe loosely "continuing" discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, the theory cannot be asserted by a former employee. For have been found to fall within the ambit of the continuing-violation principle. In these contexts, it is the ongoing program of discrimination rather than any of its particular manifestations that is the subject of attack.

The Supreme Court recently had occasion to deal with this issue in Evans, supra. There, a female flight attendant, who had worked for United Airlines from 1966 to 1968, was forced to resign under an airline rule that barred female but not male attendants from being married. She sought Title VII relief against the airline for refusing to give her seniority credit when she was rehired in 1972. Recognizing that it was too late to obtain relief based on an unlawful termination which occurred in 1968, Evans alleged that United was guilty of a "present, continuing violation of

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Footnote continued

such former employees, the complaint must be timely filed from the date of discharge, which is the controlling date.

Title VII and therefore that her claim [was] timely." 431 U.S. at 557. The Court, thus, had to decide whether United's refusal to give her seniority credit constituted a second, separate violation.

Writing for the Court, Justice Stevens noted that Evans was correct in pointing out that United's seniority system gave present effect to a past act of discrimination. However, United could treat the past act as lawful after Evans failed to file a timely discrimination charge within the 90 days allowed by &706(d).[10] Justice Stevens then emphasized:

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[10] Section 706(d), 42 U.S.C. §2000e-5(d) [42 U.S.C.S. §2000e-5(d)], then provided in part: "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred.... 78 Stat. 260. The 1972 amendments to Title VII added a new subsection (a) to §706. Consequently, subsection (d) was redesignated as subsection (e). At the same time it was amended to enlarge the limitations period to 180 days. See 86 Stat. 105, 42 U.S.C. §2000e-5(e) (1970 Ed. Supp. V).

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute had passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
>
> Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity. The critical question is whether any present violation exists.

Id. at 558. (Emphasis in original.) Thereupon, the Court held that since Evans did not allege the system discriminates against former employees discharged for discriminatory reasons as opposed to those who resigned or were dischar ed for nondiscriminatory reasons, United's continued failure to give constructive seniority was not a continuing violation" of Title VII.

The Third Circuit further elucidated the issue in Masco v. United Airlines, 574 F.2d 1127 (3d Cir. 1978).[11] Therein, Judge Aldisert noted that:

> where the violation consists of an employer's discriminatory practice of not hiring women, each exercise of that practice is a "present violation." But where the act of discrimination is limited in time, we cannot characterize every effect of that initial act as another violation. In the present case, appellees do not claim that they were refused reinstatement because they were women - rather, their contentions regarding United's refusals to reinstate have life only because of their initial separations. And those separations, because appellees did not file timely charges, are now, in the words of Evans "merely unfortunate event[s] in history which [have] no present legal consequences."

574 F.2d 1130-1131. The Court held that plaintiff's action should have been dismissed as time-barred.

In the instant case, plaintiffs urge that the effects of defendants' entry and promotional policies via the medium of Civil Service examinations have had a continuing discriminatory impact upon them. However, this is not the Bethel v. Jendoco Const. Corp., 570 F.2d 1168 (3d Cir. 1978) situation where a black carpenter alleged continuing acts of discrimination by certain contractors and the carpenter's union in refusing to employ him and other blacks, employing them for only short periods of time, continually laying them off, refusing to recall them, and refusing to consider them for supervisory positions. Judge Garth held, in part, that Bethel has alleged Title VII violations which "continued" to the filing of his EEOC charge.[12] In order for past acts to give rise to present claims, they may be continuing in the sense that they have a present impact on defendant's employment practices. It is the present, continuing adverse effects flowing from the prior policies and practices that give rise to an action for violation of Title VII, and not the prior acts themselves. Strand v. Delta Airlines, Inc., 392 F. Supp. 1184, 1189 (N.D. Ga. 1975), affirmed, 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977).

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[11] The three judge panel consisted of Aldisert, J.; Gibbons, J.; and Higginbotham, J.

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[12] See also Rick v. Martin Marietta Corp., supra. The Tenth Circuit found that, where a promotion system continually operated to hold plaintiffs in the lower echelons of this aerospace corporation, the 90 day statutory period for filing was inconsequential. As stated in Moore v. Sunbeam Corp., supra, "the failure to promote may be a continuing offense *if* it is followed by repeated promotions of others in preference to the complainant...." 459 F.2d at 828. (Emphasis supplied.) So, the focus should become whether the underlying past discriminatory acts operate on a con-

First, it is pertinent to emphasize that any refusal to hire or to promote could easily be characterized as an act that continues until the person is hired or promoted. However, the continuing violation doctrine, if not sharply circumscribed, could be used to undermine the

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Footnote continued

tinual basis in the sense they have a present impact on defendant employment practices as in Rick and in Jendoco or are completed, separate and distinct acts at the time of their occurrence.

statutorily-imposed limitations.[13] In other words, an overbroad application of the continuing discrimination principle would effectively eliminate any period of limitations of Title VII actions in contravention of congressional intent and in possible derogation of the conciliatory purposes fostered by requiring EEOC negotiations of employment discrimination complaints.[14] The continuing violation principle, if carried to the extreme, would render the statute's time constraints meaningless. See Evans, supra. It is this court's view that the concerns expressed by the Evans Court with respect to Title VII's time limits are pertinent here.

Second, the alleged act of discrimination here is not a continuing event or

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13/ See Kennedy v. Braniff Airlines, Inc., 403 F. Supp. 703 (N.D. Tex. 1975).

14/ See Strand, supra, 392 F. Supp. at 1189, citing Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176 (N.D. Ga. 1975).

practice such as that found in Jendoco, but rather is one limited in time. The Civil Service examinations are given once every three or four years. They are separate and distinct events which did not occur within the statutory period.[15] Every effect of such initial acts cannot be characterized as another violation. Masco v. United Airlines, supra, 574 F.2d at 1130-1131. Although plaintiffs allege that defendant's examinations have a continuing impact upon minorities, the "emphasis should not be placed on mere continuity. The actual question is whether any present violation exists." Evans, supra, 431 U.S. at 558. Since the acts complained of herein are "limited in time," see Masco, supra, 574 F.2d at 1130, they are not "continuing violations" under Title VII.[16]

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[15] See Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973) wherein the Court noted that there were three separate and distinct acts at issue, the latter of which occurred within the statutory period. Therefore, such period commenced to run anew from the last allegedly unlawful employment practice. 477 F.2d at 1042. (Emphasis supplied.)

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[16] See Buckingham v. United Airlines, 11 FEP Cases 344 (C.D. Cal. 1978); Officers for Justice, et al. v. Civil Service Comm. of San Francisco, et al., No. 73-0657 (N.D. Cal, granting partial summary judgment, Sept. 22, 1978). In Buckingham, the Court found that terminations or transfers of flight attendants were "completed acts" at the time they occurred. In Officers for Justice, Chief Judge Peckham dismissed a Title VII Count as being untimely, since the EEOC charges had not be filed within the 300 days from the date of the Civil Service examinations or even the last appointment therefrom. In response to plaintiffs' contention that the examinations constituted continuing violations, the Court noted "... no use has been made of these examinations for several years, either by administering the examination itself, or by appointing persons qualifying pursuant to the examination. Although the effects of these discriminatory examinations may be continuing, the examinations themselves are no longer continuing violations of Title VII." Id. at 5, citing from Officers for Justice, et al. v. Civil Service Comm. of San Francisco, et al., No. 73-0657 (N.D. Cal., memorandum opinion, June 30, 1977) at 5-6. (Footnote omitted, emphasis in original.)

Of particular significance in this regard is a recent Fourth Circuit decision, Friend v. Leidinger, 18 FEP Cases 1052 (4th Cir. 1978), rehearing en banc denied. Therein, black firefighters presently and formerly employed by the Richmond Fire Bureau brought a Title VII action alleging discrimination in certain employment and promotional practices and procedures in the Bureau. In pertinent part, the Fourth Circuit held, on the basis of Evans, that the City of Richmond could not be liable under Title VII for any test given more than 180 days prior to the filing of a charge with the EEOC.

Accordingly, given the clear mandate of the foregoing cases, the discriminatory acts herein alleged represent distinct and separate transactions and as such as mere "unfortunate event[s] in history which [have] no present legal consequences." Evans, supra, 431 U.S. at 558. Defendant's motion for dismissal of Count II of the complaint is hereby granted.[17]

II. THE PLAINTIFFS' MOTION IN VULCAN PIONEERS TO CERTIFY A PLAINTIFF CLASS FOR COUNT II OF THE AMENDED COMPLAINT IS DENIED

Since this court has herein dismissed Count II of the complaint, plaintiffs' motion is denied as moot.

III. PLAINTIFFS' MOTION IN BRONZE SHIELDS TO CERTIFY A PLAINTIFF CLASS FOR COUNT II OF THE AMENDED COMPLAINT IS DENIED

Plaintiffs seek to certify a plaintiff class for their Title VII count, Count II of the amended complaint, having six named representatives: Frank Howard, Jr., Rubin J. Battle, Floyd Bostic, Jr., Lynette Crawford, Charles E. Harris, and Olivia C. Howard. The class they seek to represent consists of all black and Hispanic persons who have been or will be denied employment or promotion in the Newark Police Department because of racially discriminatory practices of the defendants.

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[17] Although the City of Newark did not specifically file its own motion to dismiss Count II of the complaint, this Court, in view of the applicability of the foregoing analysis to the City of Newark as well, by its own motion will dismiss Count II of the complaint as to the City.

Plaintiffs urge that a class action is appropriate here. The numerosity requirements of Rule 23(a) are met since the class is too numerous to make joinder practicable. Seven hundred thirteen blacks and 256 Hispanic applicants took the January 1975 Civil Service entry-level examination. The mean score differential for blacks and whites was purportedly significant. Similarly, a number of blacks have sought promotion, but have failed.

There are questions of law and fact common to the class as a whole in accordance with Rule 23(a)(2). Such questions include whether the examinations are job-related and whether the entry-level examinations exclude a disproportionate number of minority applicants for entry and supervisory positions.

In addition, plaintiffs urge that they have complied with Rule 23(a)(3) and

23(a)(4)'s prerequisites for typicality of claims and adequacy of representation. Defendants' discriminatory hiring practices, resulting in the overall exclusion of minorities, directly affect the working conditions within the Department. Both current employees and rejected applicants have been injured by such practices. The named plaintiffs' claims, therefore, are typical of those of their class in general.

Named plaintiffs can adequately represent the class herein. Their attorney is qualified. And their claims are not in conflict with the objectives of those they purport to represent. See Johnson v. Ga. Highway Express, Inc., 419 F.2d 1122 (5th Cir. 1969); Webb v. Westinghouse Corp., 78 F.R.D. 645 (E.D. Pa. 1978). It is clear, plaintiffs point out, that these purported representatives have a practical and legally cognizable interest in ending discrimination. Also, any potential conflict will not go to the very subject matter of the litigation, 7 Wright and Miller, Federal Practice and Procedure, §1768 at 639, but rather is but a mere possibility.

Finally, plaintiffs assert that Title VII employment discrimination suits are particularly well suited for class action treatment under Rule 23(b)(2), Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 248-250 (3d Cir. 1975), and conclude that for the foregoing reasons class certification is appropriate.

Defendants take issue with plaintiffs' position primarily on two grounds. First, the named plaintiffs cannot serve as class representatives in this Title VII action because as a prerequisite to representing a class plaintiffs must have a cause of action in their own right in order to have standing to sue on behalf of others similarly situated. Sosna v. State of Iowa, 419 U.S. 393 (1975). Since the named representatives have failed to file timely EEOC charges, 42 U.S.C. §2000e-5(e), such plaintiffs lack standing to sue under

Title VII.

Secondly, defendants assert that the named plaintiffs' claims are not typical of the class they represent nor are they adequate representatives thereof. Rule 23(a)(3), 23(a)(4). In essence, defendants urge this court to limit the class of persons whom the named plaintiffs can adequately represent and to follow the "same impact" approach and not the "across-the-board" approach[18] in view of the Supreme Court's recent decision, East Texas Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977). Therein, the Court apparently narrowed the "across-the-board" approach, as Justice Stewart stated in

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[18] In determining class membership, the "same impact" approach looks not to the general nature of impact of defendant's activities, but rather to the particular impact of those activities upon the named plaintiff. Under this view, only those suffering the "same impact" as the plaintiff - for instance, a discriminatory refusal to hire - could properly be considered members of the plaintiff's class. S e, e.g, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975) (persons employed not adequate representatives of applicants); Greene v. Browne, 17 FEP Cases 1402 (E.D. Va. 1978) (plaintiffs denied promotion could not represent a class of persons applying for entry-level positions); Wofford v. Safeway Stores, Inc., 78 FRD 460 (N.D. Cal. 1978); Miller v. Motorola, Inc., 76 FRD 516 (N.D. Ill. 1977) (adopting "same impact" interpretation of Rodriguez); Barrett v. U.S. Civil Serv. Comm., 69 FRD 544 (D.D.C. 1975) (current employees not

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Footnote continued

members of class of applicants); Richmond Black Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974)(narrow interests of past applicants and past employees no adequately represented by current employees); White v. Gates Rubber Co., 53 FRD 412 (D. Colo. 1971)(rejecting "across-the-board" approach).

The across-the-board" approach looks to the general nature of impact of defendant's activities. Plaintiffs alleging "across-the-board" racial discrimination are per itted to represent all persons affected by an employer's discriminatory policies. For example, an employee whose personal grievance was confined to the circumstances aurrounding his discharge could, nevertheless, represent all individuals affected by discriminatory practices in hiring, promotion, working conditions, and wages. Johnson v. G . Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); see also Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975)("across-the-board" approach consonant with broad remedial purposes of Title VII); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (discharged employee adequate representative of future employees); Scott v. International Paper Co., Inc., No. W77-0022(R)(S.D. Miss. filed April 13, 1978)(current employees could represent applicants); Note, Title VII Class Actions, 13 Harv.L.R.-C.L.L.Rev. 175 (1978)(commentator questions whether the Rodriguez Court intended a blanket rejection of the "across-the-board" approach).

pertinent part:

> ... careful attention to the requirements of [F.R.C.P.] 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate represenative of those who may have been the real victims of that discrimination.

Id. at 405. Therefore, defendants conclude the claims of four named plaintiffs, presently police officers, are not typical of rejected and/or future applicants nor can they represent such a class. Likewise, the two named plaintiffs who failed the entry-level examinations cannot adequately represent present employees in the Police Department.

This court, in denying plaintiffs' motion, will not reach the issue of adequacy of representation since the named plaintiffs do not have standing in their own right to assert a valid Title VII claim.

Title VII mandates that the 180 day

period[19] for filing EEOC charges begins to run from the last allegedly discriminatory act, 42 U.S.C. §2000e-5(e), herein, the examinations themselves and the failure to include the names of the plaintiffs on the eligibility lists promulgated pursuant to the tests. (See Amended Complaint, ¶¶ 32, 34, 36, 39, 45.) The relevant testing and promulgation dates are as follows: entry-level police officer, Jan. 18, 1975 and May 3, 1975; police sergeant, May 18, 1974 and Sept. 14, 1974; police lieutenant, May 18, 1974 and Aug. 1, 1974; and police captain, May 18, 1974 and Sept. 5, 1974. (Mathes Affidavit, Jan. 12, 1979).

Named plaintiffs, Olivia Howard and Lynette Crawford, failed the Jan. 18, 1975 Civil Service police officer examination. They filed their EEOC charges in July 1976.

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[19] 19/ The 300 days statutory period is not applicable since, from the evidence presented, including sworn affidavits, the named plaintiffs did not first file their charges with a state agency.

(Amended Complaint, Count II.) It appears that the other four named plaintiffs, Frank Howard, Rubin Battle, Floyd Bostic, Jr. and Charles E. Harris, have not failed a promotional examination.[20] (Hyman Affidavit, Dec. 19, 1978). Frank Howard passed the sergeant's test, but was not promoted. Floyd Bostic, Jr. was promoted to sergeant in 1977. Charles E. Harris was discharged for good cause. And Rubin Battle did not fail an examination until 1978, after the filing of his EEOC charge. See note 20, supra. These four named plaintiffs filed their EEOC charges in July 1976. (Amended Complaint, Count II.)

The six named plaintiffs did not file their respective EEOC charges within the

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20/ The fact Rubin Battle failed the most recent promotional examination for captain (test given Feb. 11, 1978, list promulgated Aug. 3, 1978) cannot correct lack of standing on his part, since the named plaintiff must demonstrate standing to sue both at the time of filing the complaint as well as at the time of motion for class certification. Sosna v. State of Iowa, supra, 419 U.S. at 402.

the requisite 180 day period from what they allege to be defendants' discriminatory act, i.e., the use of the Civil Service examinations and eligibility lists thereto for hiring and promotional purposes. The EEOC charges, therefore, are untimely given the jurisdictional prerequisites of Title VII. Wetzel v. Liberty Mutual Ins. Co., supra, 508 F.2d at 246; Weise v Syracuse Univ., supra, 522 F.2d at 412. Since the named plaintiffs cannot assert a valid Title VII claim in their own right, they lack standing to sue to represent a Title VII class of plaintiffs similarly situated.

It is well established that the filing of a charge with the EEOC is not a prerequisite to recovery as a member of an injured class where one member of the class has done so. Franks v. Bowman Transp. Co., 424 U.S. 747, 771 (1976); Wetzel v. Liberty Mutual Ins. Co., supra, 508 F.2d at 246; Romasanta v. United Airlines, Inc., 537 F.2d 915, 919 (7th Cir. 1976)(Per Curiam);

Bowe v. Colgate-Palmolive Corp., 416 F.2d 711 (7th Cir. 1969). The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it. Requiring each employee to file a charge with the EEOC and then join in the suit would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted. See Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972). As clearly expressed in Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968):

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.... The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated.

416 F.2d at 720.

The purpose of 42 U.S.C. §2000e-5(e)

is to provide for notice to the charged party and to bring to bear the voluntary compliance and conciliation functions of the EEOC. See Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), cert. denied, 393 U.S. 1021 (1969). The filing of the charge permits the EEOC to determine whether the charge is adequate. In addition, it helps to determine the scope of the alleged violation, thereby narrowing the issues for prompt adjudication and decision. As held in Miller v. International Paper Co., 408 F.2d 283, 285 (5th Cir. 1969): "... no procedural purpose could be served by requiring scores of substantially identical grievances to be processed through the EEOC when a single charge would be sufficient to effectuate both the letter and spirit of Title VII." Accordingly, a plaintiff may bring a class action on behalf of those who have not filed charges with the EEOC.

However, the representative plaintiff's

claim must meet the jurisdictional requirements of Title VII, such as the timely filing of an EEOC charge and of the complaint in the action. 42 U.S.C. §2000e-5; Harriss v. Pan American World Airways, Inc., 74 FRD 24, 40-41 (N.D. Cal. 1977); Schoeppner v. General Tel. Co. of Pa., 417 F. Supp. 453 (W.D. Pa. 1976). Although it is unnecessary for all class members in a class action to file EEOC charges, a named representative must do so in his own right. Oatis, supra, 398 F.2d at 498. As Judge Aldisert in Kaufman v. Dreyfuss Fund, Inc., 434 F.2d 727 (3d Cir. 1970), cert. denied, 407 U.S. 974 (1971), a class action suit brought by a shareholder against 65 mutual funds, succinctly stated: "[A] predicate to appellee's [plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not accomplish himself, he may not accomplish as a representative of a class." 434 F.2d at 734. See also Watkins v. Chicago Housing Auth., 406 F.2d 1234 (7th

Cir. 1969); Kansas City, Mo. v. Williams, 205 F.2d 47 (8th Cir.), cert. denied, 346 U.S. 826 (1953); Chevalier v. Baird Savings Assoc., 66 FRD 105 (E.D. Pa. 1975) (Lord, C.J.); 7 Wright and Miller, Federal Practice and Procedure, §1766 (West Supp. 1977).

Standing to sue is an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made. In the words of Chief Judge Lord, "Rule 23 merely provides a procedural doorstop which holds the door open for qualified class members, *once it has been initially opened by the person or persons initially seeking entry*." Chevalier v. Baird Savings Assoc., supra, 66 FRD at 109. (Emphasis in original.) A named plaintiff who individually cannot satisfy a statutory jurisdictional requirement may not rely on potential class members to infuse him with such jurisdiction, see, generally, Snyder v. Harris, 394 U.S.

332, rehearing denied, 394 U.S. 1025 (1969), nor can he or she acquire such status through class representation. Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143, 146 (N.D. Ill. 1973), vacated on other grounds sub nom., Gonzalez v. Autom. Employees Credit Union, 419 U.S. 90 (1974); Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 694 (E.D. Pa. 1973).

Accordingly, since the six named plaintiffs have not met the jurisdictional prerequisites of Title VII, they cannot act as named representatives of the class they seek to represent. Plaintiff's motion to certify a plaintiff class for Count II of the amended complaint is denied.

Counsel for defendants shall submit an order in conformity with the above within 10 days from the date hereof.

Dated: February 23, 1979.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRONZE SHIELDS, INC., et al.,

Plaintiffs, : Civil No. 2022-72

-vs-

NEW JERSEY DEPARTMENT OF
CIVIL SERVICE, et al.,

Defendants.

VULCAN PIONEERS, INC., et al.,

Plaintiffs, : Civil 950-73

-vs-

NEW JERSEY DEPARTMENT OF
CIVIL SERVICE, et al.,

Defendants. : OPINION

SAROKIN, District Judge

Appearances:

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PROCEDURAL HISTORY

The actions before this Court challenge the legality of the hiring and promotional practices of the Newark Police Department ("Bronze Shields") and of the Newark Fire Department ("Vulcan Pioneers"). Plaintiffs in both actions allege in Count One of their Amended Complaint that defendants' policies violate the Thirteenth and Fourteenth Amendments, 42 U.S.C. §§1981 and 1983, and in Count Two, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq*.[1] Defendants have moved for summary judgment to dismiss Count One in each action primarily on the basis that the constitutional claims and 42 U.S.C. §§1981, 1983 require proof of purposeful, intentional discrimination which plaintiffshave failed to allege.[2]

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[1]/ The Title VII Count in both actions was dismissed by Judge H. Curtis Meanor, to whom this matter had previously been assigned, for being untimely. *Bronze Shields, Inc., et al. v. New Jersey Department of Civil Service*, No. 72-2022 (D.N.J. April 2, 1979) (order granting partial summary judgment); *Vulcan Pioneers, Inc., et al. v. New Jersey Department of Civil Service*, No. 73-950 (D.N.J. March 13, 1979) (order granting partial summary judgment).

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[2] The motions for summary judgment in Count One of the Complaint in each case were initially filed on September 21, 1976 (Vulcan Pioneers) and on November 3, 1976 (Bronze Shields) following the decision of the Supreme Court in Washington v. Davis, 426 U.Sl 229 (1976). Oral argument of these motions was first heard on December 13, 1976 before Judge Meanor. By letter opinion dated arch 28, 1977, Judge Meanor stayed resolution of the motions pending the filing of Title VII claims by plaintiffs.

Since the motions were originally submitted and argued, Judge Meanor, on October 16, 1978, dismissed the §1981 and §1983 and the constitutional claims as against the New Jersey Department of Civil Service and the New Jersey Civil Service Commission in both the Vulcan Pioneers and Bronze Shield cases, leaving only the individual defendants and the City of Newark in Count One. Thereafter, defendants Ralph P. Shaw, Chief Examiner of the Department of Civil Service, S. Howard Woodson, President of the Civil Service Commission, and Thomas DeLucan, John Holden, Matthias Rodriguez and Charles Walther, Commissioners thereof, were substituted for defendants William Druz, James Alloway, Anthony Statile, Henry R. Leiner, and Leonard Simmons, respectively, named in the original Complaint. In December 1978, after the order for the above

STATEMENT OF THE CASE

The Bronze Shield action alleges discriminatory hiring and promotional practices by the Newark Police Department. Plaintiffs are Black and Hispanic police officers, applicants for such positions, and a policemen's organization open to all members of the Newark Police Department. Defendants are the New Jersey Department of Civil Service, which develops and administers the civil service examinations, N.J. Stat. Ann. §11:1-1 *et seq*. (West 1976), the Chief Examiner, the New Jersey Civil Service Commission, which prescribes rules for administering civil service laws, N.J. Stat. Ann. §§11:5-1,6-1 (West 1976), the President and three commissioners thereof, the City of Newark, and the director of the Newark Police Department.

Plaintiffs allege that the Newark Police Department's background investigation

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Footnote continued

was entered, Joseph M. Ryan replaced Ralph P. Shaw as Chief Examiner of the Department of Civil Service.

practicies and use of civil service examinations discriminate against them in their employment in violation of 42 U.S.C. §§1981, 1983 and the Thirteenth and Fourteenth Amendments to the Constitution.

The Vulcan Pioneers action challenges the legality of the hiring and promotional policies of the Newark Fire Department. Plaintiffs are a Black fireman, applicants for that position, and a firemen's organization open to all members of the Newark Fire Department. Defendants are the same as those named in Bronze Shields with the exception of the Director of the Newark Fire Department who was named in lieu of the Newark police director. The complaint alleges the same discriminatory practices as set forth in Bronze Shields.

Jurisdiction herein is invoked pursuant to 28 U.S.C. §§1331 and 1343(3),(4). Venue is proper in this Court under 28 U.S.C. §1391(b).

The issue before this Court on this

motion for summary judgment is whether the plaintiffs must prove that defendants intentionally discriminated against them because of their race in order to establish a violation of 42 U.S.C. §1981.[3] The plaintiffs in this action have alleged racial discrimination in that a greater percentage of white persons than black or hispanic have been hired and promoted by the Newark Police Department and Newark Fire Department.

DISCUSSION

Plaintiffs Bronze Shields and Vulcan Pioneers argue that the proper standard for proving a §1981 discrimination action does not include an examination of the employer's intent. The plaintiffs urge

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[3] Section 1981 provides that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment,

this Court to adopt the holding of *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 99 S. Ct. 1379 (1979) that disparate impact is sufficient to establish a *prima facie* case of employment discrimination under §1981. Defendants contend that although there is a conflict among the circuit and district courts,[4] constitutional standards should be applied in §1981 cases; therefore

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Footnote continued

> pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1981; Act of May 31, 1870, c. 114 §16, 16 Stat. 144.

[4] Most courts have held that §1981, like § 983, requires proof of a racially discriminatory purpose. *See*, *e.g.*, *DesVergnes v. Seekonk Water District*, 601 F.2d 9, 14 (1st Cir. 1979); *Mescall v. Burrus*, 603 F.2d 1266, (7th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2, (5th Cir. 1978); *Johnson v. Alexander*, 572 F.2d 1219, 1222-23 (8th Cir. 1978); *Harkless v. Sweeny Independent School District*, 554 F.2d 1353 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Milwaukee v. Saxbe*, 546 F.2d 693, 705 (7th Cir. 1976); *Colaizzi v. Walker*, 542 F.2d 969, 972 (7th Cir. 1976); *Walker v. Robbins Hose Co., Noc. 1, Inc.*, 465 F. Supp. 1023, 1044 (D. Del. 1979) (dictum); *Arnold v. Ballard*, 448 F. Supp. 1025, 1027-28 (N.D. Ohio 1978); *Milburn v. Gerard*

intent must be a prerequisite to prove discrimination under §1981. The defendants, therefore, urge that since plaintiffs have

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Footnote continued

441 F. Supp. 184, 188 (E.D. Pa. 1977); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 962-66 (D. Md. 1977); Croker v. Boeing Co., 437 F. Supp. 1138, 1181-82 (E.D Pa. 1977); Guardians Ass'n of N.Y.C. v. Civil Service Comm'n, 431 F. Supp. 526, 534 (S.D.N.Y. 1977); Johnson v. Hoffman, 424 F. Supp. 490, 493-94 (E.D. Mo. 1977).

Some courts, however, have held that a showing of disparate impact will suffice without more to establish a prima facie case of employment discrimination under §1981 just as it does under Title VII. See, e.g., Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, 99 S.Ct. 1379 (1979); Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 838 n.22 (D.C. Cir. 1977)(dictum); Brown v. New Haven Civil Service Bd., 474 F.Supp. 1256, 1264 (D. Conn. 1979); Scott v. Delaware, 455 F.Supp. 1102, 1130 (D. Del. 1978); Dawson v. Pastick, 441 F. Supp. 133, 140 (N.D. Ind. 1977) no discussion of impact of Washington v. Davis on §1981; Winston v. Smithsonian Science Information Exchange, 437 F.Supp. 456, 473 (D.D.C. 1977). For an excellent in-depth discussion of the proper standard of proof in §1981 civil rights suits, see Heiser, Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. §1981, 16 San Diego L. Rev. 207 (1979).

made no prima facie showing of intentional discrimination, the §§1981, 1983 and the Thirteenth and Fourteenth Amendment claims should be dismissed. This Court finds that intent is necessary to establish a claim of employment discrimination under §1981. For the following reasons, defendants' motions for summary judgment are granted.

Different standards of proof have evolved in employment discrimination cases depending upon the precise statutory or constitutional ground of the alleged violation. For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971),[5] the Supreme

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[5] In this case, the plaintiffs were Black employees of Duke Power Company who alleged employment discrimination on the basis of an employment/transfer requirement which mandated a passing score in a standardized general intelligence test or a high school education when neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Blacks at a substantially higher rate than white applicants and the jobs sought were previously filled only by white employees throughout the company's employment history. Id. at 425-26.

Court held that Title VII[6] requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race or other impermissible classifications. *Id*. at 431. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," notwithstanding the employer's lack of discriminatory intent. *Id*. at 43-133. The Supreme Court stated that

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanism that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.

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[6] Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e *et seq*. proscribes employment discrimination on account of race, color, religion, sex, and national origin. Section 703(a) provides that an employer may not "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or other-

Id. at 432. (emphasis in original. Therefore, in order to prove a claim of employment discrimination, a plaintiff need only show that the facially neutral employment practice has a "disparate impact" or effect on racial minorities.[7] The burden of proof then shifts to the defendant who must show business justification in order to preserve the practice. Id. at 432. See generally B. Schlei & P. Grossman, Employment Discrimination Law at 1158 (1976 & Supp. 1979).

Footnote continued

wise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Section 703(h) authorizes the use of "professionally developed ability tests provided that such test, its administration or action upon the results is not designed, intended or used to discriminate ..." 42 U.S.C. §2000e-2(a),(h).

7/ The disparate impact or effects theory of discrimination focuses primarily upon the effect of the practice or rule rather than the intentions of the employer. Statistics may be utilized by the plaintiff in order to show disparate impact and prove his *prima facie* case. See B.Schlei & P. Grossman, Employment Discrimination Law at (1976 & Supp. 1979).

More recently, in its landmark decisions, Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-71 (1977), the Supreme Court held that proof of both an invidious discriminatory purpose and a racially disproportionate impact is necessary to establish that government action violates the Fifth or Fourteenth Amendments.

In Washington v. Davis, 426 U.S. 229 (1976), the plaintiffs, Black police officers and applicants, alleged discrimination against District of Columbia officials, claiming the Police Department's recruiting and promotional procedures were discriminatory on the basis of race in violation of the Fifth Amendment[8] and the District of Columbia Code.[9] These practices included a

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8/ The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

U.S. CONST., amend. 5.

written personnel test which operated to disqualify a disproportionately high number of Black applicants. Id. at 232-33.

The district court granted defendants' motion for summary judgment based upon, inter alia, its determination that plaintiffs' claim lacked any allegations of intentional discrimination. The Court of Appeals for the District of Columbia reversed, ruling that lack of discriminatory intent was irrelevant to a determination of constitutional violations, if it could be shown that the test had a disproportionate imact on minorities and no adequate countervailing justification for the test could be established by the city.

The Supreme Court found that the Court

Footnote continued

9/ The plaintiffs also alleged statutory violations under 42 U.S.C. §1981 and D.C. Code §1-320. Id. at 233 & n.2. However, the motions for summary judgment filed in the district court only raised a Fifth Amendment due process violation asserting discrimination with respect to the recruiting procedures. The case was then ultimately decided by the Supreme Court on constitutional grounds rather than statutory grounds. See id. at 238.

of Appeals below had erroneously applied the Title VII standard of proof, disparate impact, to a case involving constitutional standards. The Court determined the appropriate analysis for claims based upon the Fifth Amendment and the Fourteenth Amendment is under the equal protection clause. Id. at 239. Using the equal protection constitutional standard, the Court held that a facially neutral employment practice is generally not unconstitutional because it has a racially discriminatory impact. Id. The Court further stated:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race ... our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Id.

In Arlington Heights, the Supreme Court reiterated the Washington v. Davis principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." 429 U.S. at 264-65. Arlington Heights involved a zoning board's refusal to rezone land from a single-family to a multiple-family classification. Consequently, a low-rent project could not be built, and plaintiffs attacked the village's zoning plan as racially discriminatory. The district court ruled that the village was not motivated by racial discrimination, but by a desire to maintain the village's zoning plan and to protect property values in the area. The Seventh Circuit reversed because of the disproportionate racial effect of the refusal.

The Supreme Court reversed, noting the finding of both courts below that no discriminatory intent had been proved. Id. at 270-71. Justice Powell reiterated the Davis proposition that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Id. at 265 (citing Washington v. Davis, supra, 426 U.S. at 242). (emphasis added). He noted, however, that "Davis does not require a plaintiff to prove that the challenged action rests solely on racially discriminatory purposes" but rather that the "discriminatory purpose has been a motivating factor." Id. at 265-66.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action - whether it "bears more heavily on one race than another" may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.

Id. (citation omitted).

Together, Davis and Arlington Heights provide that proof of intentional discrimination on the basis of race is required for all claims brought solely under the Fifth and Fourteenth Amendments. Neither case, however, answers the narrower question posed herein: must plaintiffs also prove discriminatory purpose on the part of the defendants for those claims arising under 42 U.S.C. §1981?

Section 1981, unlike Title VII and the Equal Protection Clause, has its origins in both the Thirteenth[10] and Fourteenth Amendments.[11] The Supreme Court in *Runyon*

10/ The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude ... shall exist within the United States." U.S. CONST., amend. XIII, sec. 1. Section 2 is the enabling clause providing for appropriate Congressional legislation. In the *Civil Rights Cases*, 109 U.S. 3 (1883) the Supreme Court addressed the Thirteenth Amendment as a tool granting "Congress ... power to pass all laws necessary and proper for abolishing all badges and incidents of slavery." *Id.* at 20; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

11/ Title VII has origins in both the Fourteenth Amendment and the commerce clause. See *Davis v. County of Los Angeles*, 566 F.2d 133 , 1349 & n.7 (9th Cir. 1977) (Wallace J., dissenting).

v. McCrary, 427 U.S. 160 (1976) firmly established that §1981 is derived from the Civil Rights Act of 1866[12] which was passed pursuant to the Thirteenth Amendment. Reliance upon the Fourteenth Amendment, however, comes from §16 of the Voting Rights Act of 1870 which contained language which closely paralleled §1 of the 1866

12/ The 1866 Act was re-enacted in 1870, about two years after the passage of the Fourteenth Amendment in order to maximize the likelihood that it would proscribe private as well as state discriminatory acts. In particular, section 1 of the 1866 Act was re-enacted in section 18 of the Enforcement Act of 1870; section 16 of the Voting Rights Act of 1870 repeated the language of the 1866 Act with some alterations. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 & n.71 (1968); see generally Heiser, supra, note 4, at 230-40; Note, Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend, 40 Geo. Wash. L. Rev. 1024, 1036-39 (1972).

Act.[13] See *id*. at 169-70 n.8; *Johnson v. Railway Express*, 421 U.S. 454, 459 (1975). Since §1981 is based in part upon the Fourteenth Amendment, the standard of proof for §1981 should be consistent with the standard used to establish a *prima facie* case of discrimination under the Equal Protection Clause of the Fourteenth Amendment. Therefore, proof of discriminatory intent is required in actions proceeding under §1981.

13/ In *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973) the Court determined that §1982 proscribed racial discrimination in a private recreational facility. *Id*. at 437. The Court stated that the "operative language of both 1981 and 1982 is traceable to the Act of April 9, 1866." *Id*. at 439.

> The present codification of §1981 is derived from ... the Act of May 31, 1870 ... Although the 1866 Act rested only on the Thirteenth Amendment ..., and indeed, was enacted before the Fourteenth Amendment was formally proposed, the 1870 Act was passed pursuant to the Fourteenth and changes in wording may have reflected the language of the Fourteenth Amendment. The 1866 Act was re-enacted in 1870, and the predecessor of the present §1981 was to be "enforced according to the provisions" of the 1866 Act.

Id. at 439-40 & n.11 (citations omitted).

In arriving at said determination, this Court was required to consider whether Congress intended that every contract or refusal to enter into a contract which had a disparate and discriminatory impact should create a cause of action, where such impact was not intended by the party charged. The Court has read the complete legislative history preceding the enactment of the applicable 1866 and 1870 Acts. The debates involved speeches which still decried the abolition of slavery.[14] It was unlikely in

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14/ The following represents a typical exchange:

"Mr. Thayer. Will the gentleman permit me to ask him a question?

Mr. Rogers. Certainly.

Mr. Thayer. The gentleman says he is a progressive man, and a man in favor of the extension of human liberty. I desire the gentleman to state whether he voted for the constitutional amendment abolishing slavery.

Mr. Rogers. No, sir; and I thank God that I never did. I could not lie down on my bed at night with a clear conscience if I had been guilty of being engaged as a participant in robbing a portion of the people of this country of millions of dollars invested under the Constitution in property in negroes, property which was recognized by our revolutionary fathers, and for the protection of which they fought as much as anything else."

Cong.Globe, 39th Cong., 1st Sess. 1123 (1866).

the atmosphere of such rhetoric that the concept of disparate impact could have been within the contemplation of the legislators, no less been incorporated into the statute. The goal of the legislation was to prevent intentional acts of discrimination aimed at circumventing the grant of civil rights to the freed slave. The outcry was against the blossoming statutes and codes aimed at defeating and denying the newly won freedoms. The legislative history renders no support for the constructions urged by plaintiffs. Although the debates are free of any discussion of burden or standard of proof, their review in the context of the times does not warrant a finding that discriminatory impact, in the absence of an intention to produce such result, violates the statute. Nor does the language of the statute itself support such a conclusion.

In the absence of language in the statute or legislative history to support it, should disparate impact, standing alone, in the absence of wrongful motive or intention, be a sufficient standard under §1981? In addition to the constitutional origins of the statute, there are other reasons upon which the Court may rely in support of an "intent" standard for §1981. The Suprem Court in Jones v. Alfred H. Mayer Co., stated that "racially motivated deprivations" were proscribed by the 1866 Act, thereby lending support to an "intent" standard under §1981.

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion ... that §1 was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetuated "under color of law" were to be criminally punishable under §2.

392 U.S. at 426; see Davis v. Count of Los Angeles, 566 F.2d 1334, 1349-50 (9th Cir. 1977)(Wallace, J., dissenting). The Jones Court determined that the Congressional intent in passing the 1866 Act was not only to eradicate "racially discriminatory laws

in the former Confederate States," i.e., the Black Codes, id. at 426, but also to prohibit "private injustices against Negroes -- [such as] white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities." Id. at 427-28 (citations omitted). Such language of the Supreme Court supports the theory that the purpose of the 1866 Act was to proscribe intentional discrimination.

This Court is reluctant to reach any conclusion which would blunt any arrow from the quiver capable of piercing and eliminating discrimination. However, an analysis of the scope of §1981 necessitates a finding that it was not meant to create a cause of action for inadvertent and unintended acts which resulted in discrimination. The Court takes some comfort from the existence of Title VII, which affords a remedy under such circumstances but provides limitations and procedural safeguards which justify a different standard of proof.

This Court's conclusion gains support from the dissimilarity of the language and legislative history between §1981 and Title VII.[15] Compare Jones v. Alfred H.

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[15] In Washington v. Davis, supra, the Court clearly pointed out the apparent differences between the operative words of the Constitution and of Title VII as follows:

> [h]owever, this [Title VII] proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard of the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.

426 U.S. at 247-48.

Mayer Co., supra, 392 U.S at 422-37 with Griggs v. Duke Power Co., supra, 401 U.S. at 430-36. The purpose of the Civil Rights Act of 1964, as amended, is to eliminate discrimination through formal and informal remedial procedures. The emphasis is on conciliation, as a last resort; the federal courts are envisioned as the final arbitrators, but not before the potential litigant exhausts a myriad of administrative procedures.[16]

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[16] As aptly explained by Judge Wallace of the Ninth Circuit, dissenting in Davis v. County of Los Angeles, supra:

> Title VII is part of a complex statute; together with its accompanying regulations it identifies with particularity the conduct is proscribes and imposes a course of administrative remedies that must be exhausted before the jurisdiction of the courts may be invoked. 42 U.S.C. §2000e-5: 29 C.F.R. §§1601.1 et seq. Because these barriers tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects, it is not unreasonable to provide that a prima facie case may be established without a showing of discrimiantory intent.

566 F.2d at 1350 (Wallace, J., dissenting).

Section 1981 is a very different statute.[17] Its purpose is and always has been to provide a litigant an unencumbered avenue into federal court. Its "broad language stands in stark contrast to

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17/ In Johnson v. Railway Express Agency, 421 U.S. 454 (1975) the Court held that discrimination in the making and enforcing of employment contracts is within the sphere of protection afforded by §1981. Id. at 459-60; see Bethel v. Jendoco Construction Corp., 570 F.2d 1168, 1174 (3d Cir. 1978). With respect to remedies under §1981, the Court stated that "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages" would be available to those individuals establishing a §1981 cause of action. 421 U.S. at 460.

In Johnson the Court also pointed out a few of the differences between §1981 and Title VII:

> Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U.S.C. §2000e(b) (1970 ed., Supp. III). Also, Title VII offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable at least under the specific terms of §1981.
>
> . . . . . .
>
> Further, it has been noted that the filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of an §1981 action

Id. at 460 (citations omitted).

the sophisticated, detailed provisions of Title VII." Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 966 (D. Md. 1977). Its reach extends far beyond the "field of public employment," Washington v. Davis, supra, 426 U.S. at 248, to the expansive realm of both public and private contractual relationships. Without some type of "screening mechanism," Davis v. County of Los Angeles, supra, 566 F.2d at 1350 (Wallace, J., dissenting), courts may become innundated with frivolous claims. Such a mechanism, therefore, is the requirement of discriminatory intent.

Accordingly, in light of the statutory and structural differences between §1981 and Title VII as well as §1981's historical and conceptual relationship with the Constitution, in particular the Thirteenth and Fourteenth Amendments, this Court concludes that discriminatory intent is a necessary element in proving a violation of §1981. Section 1981 must be governed by the same considerations as the constitutional provisions from which it is derived.

As previously indicated, defendants' motions for summary judgment have been granted. In so doing, this Court has considered the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits pursuant to Fed. R. Civ. P. 56(c). Summary judgment is proper in those cases where there are no genuine issues of material fact. In the instant case, there has been no showing in any manner nor is there an allegation in the complaints that the defendants have engaged in purposeful course of action to discriminate on the basis of race.[18]

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[18] Plaintiffs have also alleged claims of discrimination under §1983 and the Fourteenth Amendment. It is clear that under Washington v Davis, supra, and Arlington Heights, supra, that intent is a necessary element to prove a prima facie case of discrimination under §1983. For the reasons already stated by the Court, summary judgment is granted to the defendants with respect to this claim since the plaintiffs have failed to make a showing that the defendants have intentionally discriminated on the basis of race.

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979),[19] the Supreme Court clarified the definition of "discriminatory purpose":

> "Discriminatory purpose," however implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 279. Without a showing that the defendants selected or reaffirmed a particular course of conduct, in this case the hiring and promotional procedures, due to its adverse effects upon Blacks and Hispanics, there is no disputed material fact. The Court recognizes that under certain circumstances, disparate impact may give rise to an inference of intentional discrimination. However, such inference would not be permissible predicated upon the factual assertions of disparate impact standing alone as alleged by plaintiffs in this matter.

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[19] *Personnel Administrator of Massachusetts v. Fenney* involved a female state employee who on the ground of sex discrimination challenged the State's Civil Service law which provided "absolute" preference to veterans. 442 U.S. at 259. The Court upheld the veterans preference despite the disparate impact on females since no intentional discrimination could be found. *Id*. at 281.

For the foregoing reasons, summary judgment is entered in favor of the defendants and against the plaintiffs in these matters, without costs.

/s/______________________
H. LEE SAROKIN
UNITED STATES DISTRICT JUDGE

April 8, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2392

HOWARD, FRANK, JR., RUBIN J. BATTLE,
et al.,
v.
NEW JERSEY DEPARTMENT OF CIVIL
SERVICE, NEW JERSEY CIVIL SERVICE
COMMISSION, et al.,

OLIVIA HOWARD and LYNETTE CRAWFORD,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 77-1471)

Present: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on July 10, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed August 24, 1979 dismissing both the Title

VII and the § 1983 claims of sex discrimination be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Sally Mrvos
Clerk

December 4, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2392

FRANK HOWARD, JR., et al.,
Plaintiffs-Appellants

v.

NEW JERSEY DEPARTMENT OF CIVIL
SERVICE, et al.,
Defendants-Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.*

The petition for rehearing filed by

Plaintiffs-Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons did not participate in the consideration of this matter.

Judges Higginbotham and Sloviter would grant the petition for rehearing.

By the Court,

/s/ Weis
Judge

Dated: December 30, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2003 and 81-1133

BRONZE SHIELDS, INC., et al.,
Appellants

vs.

THE NEW JERSEY DEPARTMENT OF CIVIL SERVICE, et al.

(D.C. Civil No. 72-2022)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: WEIS, VAN DUSEN and HIGGINBOTHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 17, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered March 12, 1979, August 9, 1979, May 1, 1980, and June 11, 1980, as rendered final by the order entered December 2, 1980, be, and the same are reversed insofar as summary judgment on Count I was granted in favor of Newark and the director of the Newark police department and the cause remanded for consideration whether Newark intentionally discriminated during the applicable limitations period, and affirmed in all other respects; and,

It is further ordered and adjudged that the appeal at No. 80-2003, be, and the same is hereby dismissed as premature; and

It is further ordered and adjudged that the motion to dismiss the appeal at No. 81-1133, be, and the same is hereby denied, all of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

December 1, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1133

BRONZE SHIELDS, INC., et al.,
Plaintiffs-Appellants

v.

NEW JERSEY DEPARTMENT OF CIVIL
SERVICE, et al.,
Defendants-Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, _Chief Judge_, VAN DUSEN, ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, _Circuit Judges_*

The petition for rehearing filed by
Plaintiffs-Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* Honorable John J. Gibbons did not participate in the consideration of this matter.

Honorable A. Leon Higginbotham,Jr. and Honorable Dolores K. Sloviter would grant the petition for rehearing.

By the Court,

/s/ Weis
Judge

Dated: December 28, 1981

Opposition

No. 81-1895

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRONZE SHIELDS, INC., *et al.*,
Petitioners,

vs.

NEW JERSEY DEPARTMENT OF CIVIL SERVICE, *et al.*,
Respondents.

OLIVIA HOWARD, *et al.*,
Petitioners.

vs.

NEW JERSEY DEPARTMENT OF CIVIL SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Counter-Statement of Issues Involved

1. Did the court below err in concluding that EEOC charges filed in June and July of 1976 were untimely filed when the last alleged act of discrimination that could have been asserted against the State defendants was the May 3, 1975 promulgation of a civil service employment roster?

2. Did the court below properly conclude that an employment discrimination suit based on 42 U.S.C. §1981 requires the establishment of an intent to discriminate?

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No. 81-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRONZE SHIELDS, INC., *et al.*,

Petitioners,

vs.

NEW JERSEY DEPARTMENT OF
CIVIL SERVICE, *et al.*,

Respondents.

OLIVIA HOWARD, *et al.*,

Petitioners,

vs.

NEW JERSEY DEPARTMENT OF
CIVIL SERVICE, *et al.*,

Respondents.

On Appeal from a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter involves consolidated appeals in the Third Circuit alleging race-based and sex-based discrimination in the hiring and promotion of police officers for the City of Newark, New Jersey.

Bronze Shields, Inc. v. *New Jersey Department of Civil Service* was initiated in December 1979 by the filing of a one-count complaint against State defendants, which included the New Jersey Department of Civil Service and the New Jersey Civil Service Commission, and municipal defendant City of Newark, alleging violations of rights under 42 U.S.C. §§1981 and 1983 and the Thirteenth and Fourteenth Amendments. In particular, plaintiffs generally asserted, as against State defendants, that written Civil Service police examinations impermissibly excluded a disproportionate number of Black and Hispanic applicants. The complaint was later amended in November of 1977 to add a Title VII claim as Count II based on an allegation of racial discrimination.

State defendants initially moved for summary judgment of the complaint on November 3, 1976 following this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), on the basis that plaintiffs had failed to allege or establish an intent to discriminate. After oral argument, the district court stayed resolution of the motion pending administrative processing of six Equal Employment Opportunity Commission ("EEOC") complaints. These EEOC matters were filed between June 30, 1976 and July 12, 1976 and, in nearly identical language, merely asserted, with respect to State defendants New Jersey Department of Civil Service and Civil Service Commission as the only State parties charged, that these entities administered hiring and promotional examinations for Newark police positions that discriminated against Blacks and Hispanics.

Under New Jersey civil service testing procedures, written and physical examinations for police positions are part of the established employee selection system for such positions. The testing for entry-level police officer appointments includes a written test and a physical performance test, both parts of which must be passed before an individual can be included on the designated eligibility roster. Promotional hiring from an employment roster is based solely on the results of a written, but not physical, examination.

The EEOC charges alleging racial discrimination filed in June and July of 1976 were based on eligibility lists promulgated on the following dates: police lieutenant, August 1, 1974; police captain, September 5, 1974; police sergeant, September 14, 1974; and entry-level police officer, May 3, 1975. Hence, all of the EEOC complainants knew by May 3, 1975 how they performed on the tests at issue and, consequently, where they stood on the eligibility rosters promulgated as a result of same.

Accordingly, the district court dismissed Count II of the amended complaint as untimely filed. This decision was upheld by the Third Circuit which concluded that the issuance of the last eligibility list on May 3, 1975 was a separate and distinct act that, as the last alleged act of discrimination, commenced the running of 180-day limitations period; thereby precluding the EEOC charges filed in June and July of 1976 (Pa10 to Pa22). The district court subsequently dismissed Count I of the complaint, which alleged a violation of §1981, on the ground that intent was a necessary element for presenting a cause of action under 42 U.S.C. §1981, and that intentional discrimination had been neither alleged nor proved.

The Third Circuit, in accord with the overwhelming weight of authority, affirmed (Pa22 to Pa25).

The appeal in *Howard* v. *New Jersey Department of Civil Service,* alleging sex discrimination, arises out of the same factual background.

On January 18, 1975, plaintiffs Lynette Crawford and Olivia Howard competed in a New Jersey civil service written examination for the position of police officer, Newark. Both plaintiffs were subsequently notified that they had failed this examination and were, therefore, precluded from taking the Police Officer Physical Performance Test ("POPPT"), which was only administered to those persons who successfully completed the written examination. Candidates who passed both the written examination and the POPPT were then ranked on the basis of a combined test score and included on a specific civil service police officer eligibility roster for the City of Newark which was promulgated on May 3, 1975.

Plaintiffs thereafter filed identical charges with the EEOC on July 9, 1976 against municipal defendant City of Newark and State defendants New Jersey Department of Civil Service and the New Jersey Civil Service Commission alleging, with respect to State defendants, that they had "administered hiring and promotional examinations for police positions which discriminate against Blacks and Hispanic men and women."

Plaintiffs thereafter filed a complaint in the United States District Court for the District of New Jersey on July 19, 1977. The First Count of the complaint, which plaintiffs asserted was brought pursuant to Title VII and charged race discrimination, was voluntarily dismissed after the pending suit alleging racial bias in Newark police matters, *Bronze Shields, Inc.,* was amended to add a Title VII basis of race discrimination as Count Two in November 1977 based on, among others, plaintiffs' E.E.O.C. charges. The *Howard* matter thereafter only concerned Count Two of the original complaint grounded in Title VII which alleged sex discrimination and challenged the validity of the physical performance component of the entry-level police officer examination. Subsequently, this count was dismissed by the district court for the same reason prompting dismissal of the Title VII count in *Bronze Shields, i.e.*, the filing of EEOC charges in July of 1976 was more than 180-days after the promulgation of the eligibility roster for police officer promulgated May 3, 1975, which was the last alleged act of discrimination attributable to the State defendants. The district court also concluded that since plaintiffs failed the written examination, the passing of which was a prerequisite to competing in the physical component, they lacked standing to challenge the validity of the physical test on the basis of alleged sex discrimination. This determination was affirmed by the Third Circuit (Pa51 to Pa59).

ARGUMENT

This Court should deny the petition for certiorari because the issues raised in this matter have either already been addressed and settled by this Court or because there is no substantial conflict with the decisions of the circuits.

A. The timeliness of the EEOC charges.

There is no need for the Court to grant *certiorari* in this matter because the decision in *Delaware State College, et al.* v. *Ricks,* 449 U. S. 250 (1980) firmly settles the means of identifying the alleged unlawful discriminatory act that commences the 180-day limitation period for filing EEOC charges. In that suit, which charged a discriminatory denial of tenure to a professor based on his national origin, the Court identified the College Trustees' unequivocal notice to Ricks on June 26, 1974 that he would be denied tenure as the unlawful employment practice that commenced the limitations period for filing an EEOC complaint, and not June 30, 1975 which was the expiration date of his one-year "terminal" contract. As reasoned by the Court:

> . . . the only alleged discrimination occurred—and the filing limitations period therefore commenced—at the time the tenure decision was made and communicated to Ricks. This is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later . . . "the proper focus is upon the time of the *discriminatory acts,* not upon the time at which the *consequences* of the acts, became most painful." *Id.,* 449 U. S. at 258.

The Court's reasoned analysis that the limitations period commences when a person receives clear notice of the alleged discriminatory event and not at some remote time when the results of that particular event may actually be felt is plainly dispositive of the issue of timeliness raised in the present consolidated appeals. The Court's opinion clearly rebuts characterization of the timeliness issues raised in these two cases as examples of continuing violations. See, *e.g., United Air Lines* v. *Evans,* 431 U. S. 553, n. 3 (1977).

Hence, as established in *Ricks,* the focus of inquiry is the alleged discriminatory act—here the promulgation of the eligibility list which is a separate and distinct event—and not the eventual consequences of that act—plaintiffs' non-appointments. The use of the promulgation of the eligibility lists as the proper event to determine the timeliness of an EEOC charge is thus the most sensible and useful focal point in considering the interests of the present parties and also the rights of all persons who compete in Civil Service examinations. Such an approach protects the State defendants from a claim of discrimination occurring long after its primary responsibilities of administering an examination and promulgating an eligibility list have ended since actual hirings—which could occur late in the life of an eligibility list—are made by the applicable municipality depending on their particular needs and budgetary resources. Accordingly, the Third Circuit properly concluded the issuance of the last eligibility roster in this matter on May 3, 1975 represented the triggering act or actionable violation from which plaintiffs would have had to file a timely EEOC charge as against the State defendants. Once the list was promulgated, any candidate who had cause to complain knew at that time if he or she was the victim of a discriminatory test.

Plainly, this case is governed by the principles enunciated by *Ricks.* But in any event, there is no split among the circuits on this issue. All of the cases cited by plaintiffs in support of their position concern cases of ongoing or continuing discrimination. See *e.g., Roberts* v. *North American Rockwell Corporation,* 650 F. 2d 823 (6th Cir. 1981). Also, plaintiffs' reliance on *Guardians Ass'n of New York* v. *Civil Service Commission of the City of New York,* 633 F. 2d 232 (2d Cir. 1980), petition for *cert.* filed (No. 81-431) is particularly inappropriate since it concerns the determination of layoff procedures, again, an ongoing discrimination, and does not address initial hirings for an entry-level position.

Therefore, this Court should deny *certiorari* on this ground because the matters sought to be addressed have already been settled beyond doubt by the decision in *Delaware State College* v. *Ricks.*

B. Intentional discrimination under 42 U.S.C. §1981.

Plaintiffs also ask this Court to grant *certiorari* so that it can determine whether intentional discrimination is a necessary element of a claim brought under 42 U.S.C. §1981. However, as plaintiffs point out, this Court has already granted a petition for a writ of *certiorari* in *Guardians Ass'n of New York* v. *Civil Service Commission of the City of New York,* No. 81-431, which presents the exact same question. And, as plaintiffs also note, the question of standard of proof for 42 U.S.C. §1981 claims may also be reached by this Court in *General Building Contractors Association, Inc.* v. *Pennsylvania,* No. 81-280 (Pb19). Accordingly, the Court is presented with ample opportunity to consider the questions urged by plaintiffs aside from this case. It would thus be duplicative and unnecessarily clog the Court's docket to grant *certiorari* in this matter to decide the same issue.

In addition, the authority is virtually uniform that intent to discriminate must be proved as a successful element of a §1981 discrimination claim following this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), which held that intentional discrimination had to be proved under 42 U.S.C. §1983. See *e.g., Guardians Ass'n of New York* v. *Civil Service Commission of the City of New York, supra; Croker* v. *Boeing Co.,* 662 F.2d 975 (3d Cir. 1981); *Craig* v. *County of Los Angeles,* 626 F.2d 659, 668 (9th Cir. 1980), *cert.* denied 450 U.S. 919 (1981); *Mescall* v. *Burrus,* 602 F.2d 1266, 1271 (7th Cir. 1979); *Williams* v. *DeKalb County,* 582 F.2d 2, 2-3 (5th Cir. 1978) (per curiam); *Johnson* v. *Alexander,* 572 F.2d 1222 (8th Cir.), *cert.* denied 439 U.S. 986 (1978).

In summary, this Court already has before it cases that present the issue of whether intentional discrimination is an element of a claim under 42 U.S.C. §1981. It would thus be wasteful of this Court's resources to grant *certiorari* in this case to review the same issue. In addition, the overwhelming weight of authority is that such intent under §1981 is required.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

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